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## Repressive welfare state, the spiral of obligations and sanctions

Vonk, G.J.

*Published in:*  
European Journal of Social Security

**IMPORTANT NOTE:** You are advised to consult the publisher's version (publisher's PDF) if you wish to cite from it. Please check the document version below.

*Document Version*  
Publisher's PDF, also known as Version of record

*Publication date:*  
2014

[Link to publication in University of Groningen/UMCG research database](#)

*Citation for published version (APA):*

Vonk, G. J. (2014). Repressive welfare state, the spiral of obligations and sanctions. *European Journal of Social Security*, 16(3), 188-203.

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# REPRESSIVE WELFARE STATES: THE SPIRAL OF OBLIGATIONS AND SANCTIONS IN SOCIAL SECURITY

GIJSBERT VONK\*

## *Abstract*

*This article discusses the trend of introducing increasingly strict obligations and sanctions for social security claimants in Germany, the Netherlands and the UK. It is argued that this trend should be judged critically because it upsets the balance between rights and obligations for benefit claimants and may undermine the 'elevating function' of social security. Courts play an important role in maintaining the balance between rights and obligations. The article discusses recent case law in the three countries and also refers to a remarkable case at the Czech Constitutional Court of November 2012, which paves the way for a more fundamental approach to scrutinising repressive welfare state excesses.*

**Keywords:** abuse of rights; conditionality; forced labour; fraud; mandatory work activity; sanctions

## 1. INTRODUCTION

In our present climate, social security fraud and abuse of benefit rights have become a real public concern. Individual fraudsters who are caught out are paraded in front of the camera and collectively scorned and ridiculed in the newspapers. People increasingly report suspected cases of benefit abuse to specially created complaints lines. Politicians from both the left and the right promise even stricter rules and tougher sanctions. While it may be true that the improper use of benefit rights used to be taboo, it has become something of a public obsession.

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The increasing attention given to benefit abuse and fraud is not an isolated phenomenon, but part of a wider trend which I refer to as the ‘rise of the repressive welfare state’. This is a trend that has been commented on by several social academics on both sides of the Atlantic. The uncrowned champion among them is the French sociologist Loïc Wacquant, who wrote a stirring account of changes in the welfare state in the United States. The book bears an ominous title: *Punishing the Poor*.<sup>1</sup> Wacquant argues that, in the US, problems are no longer solved on the basis of a social agenda. Instead, the citizen is made fully responsible for his own life and the degree to which he or she can participate in society. Where these policies fail, the state reacts with sanctions and criminal measures. In this way, the ‘light’ American liberal state has developed a ‘heavy’ substructure to suppress the poor.

A repressive trend in social security policy and legislation has also been reported in Australia,<sup>2</sup> in Britain<sup>3</sup> and in the Scandinavian countries,<sup>4</sup> partly as a by-product of activation policies. This article focuses on the spiral of obligations and sanctions in the area of both fraud and the suspected abuse of benefit rights. The purpose is to critically reflect upon this trend in the legislation of three countries, i.e. Germany, the Netherlands and the United Kingdom. The three objectives of this article are:

1. to describe the spiralling obligations and sanctions in Germany, the Netherlands and the UK with reference to legislative developments from a dynamic perspective (section 3);
2. to interpret these changes with reference to possible explanations and common elements (section 4); and
3. to monitor the responses of the judiciary to the repressive trend in the legislation (section 5).

The latter point is of particular importance to this article. Our social security systems function under the rule of law. This means that the balance of rights and obligations is, ideally, subject to interaction between the legislature and judiciary. If the legislature and the administration focus strongly on the disciplinary function of social security and neglect the rights of the beneficiaries, then it is up to the courts to restore the balance. The more uncompromising the policies, the more robust and constitutional the response of the judiciary can be expected to be; addressing the needs of the individual and formulating clear limitations. It is interesting to see how, and to what extent, courts have taken up this role. The discussion of case law focuses primarily on the response to obligatory work activities as a condition for receiving benefit. By way of a short excursion, I will also briefly pay some attention to a remarkable and uncompromising decision of the Czech Constitutional Court on this matter.

<sup>1</sup> Wacquant (2009).

<sup>2</sup> Carney (2008).

<sup>3</sup> Larkin (2007) and further references included in Section 4 of this article.

<sup>4</sup> van Aerschoot (2011).

## 2. FRAUD AND ABUSE OF BENEFITS RIGHTS: BIRDS OF A FEATHER

Before starting on the agenda, I first provide some conceptual clarification. In order to capture the repressive trend in our welfare states, I deal not only with the question of fraud and the reaction to it but also with the perceived abuse of benefit rights. The concept of 'abuse of rights' is quite a murky one. I use it to circumscribe the situation of a claimant who is deemed to be not entitled to benefit because he or she is unwilling to work and participate in the society. It may be argued that mixing up fraud and abuse is unwarranted and unjustified because these are two different things. From a legal point of view, this is correct. In social security law a distinction can be made between 'information duties' and 'co-operation duties'. If one gives false information in order to gain some financial advantage, this is an offence under criminal law which can be sanctioned by fines, obligatory community service or a prison sentence. These are punitive sanctions and Article 6 ECHR provides a measure of protection to persons charged with a criminal offence. The same is the case if one withholds information which is relevant for determining the level of benefit, for example, failing to report a change in earnings or in the household situation. However, if one fails to apply for a job or to undertake community service, this merely constitutes a breach of an administrative obligation which can only be sanctioned by withholding benefit rights. Such sanctions may hit beneficiaries hard, but they are not part of the criminal law system.

Nonetheless, while, technically speaking, fraud and abuse of rights are different things, they also touch upon each other. Both forms of conduct are subject to the same spiral of formulating increasingly stricter obligations and tougher sanctions. More importantly, both operate as boundary markers establishing a line between those who are deserving and those who are undeserving of social security support. From the latter perspective, there is an interesting grey zone where 'welfare fraud' merges into 'welfare as fraud'.<sup>5</sup> When policies increasingly emphasise personal responsibility, benefit dependency is more easily perceived as somebody's failure to take up this responsibility. And when such failure is subsequently sanctioned by withholding benefit rights, it is easy to see why fraud and the perceived abuse of benefits rights are birds of a feather. Both types of behaviour are deemed incorrect; both are followed by a negative legal response.

<sup>5</sup> A small qualitative jump used creatively by Chunn and Cavigan (2006).

### 3. SPIRALLING OBLIGATIONS AND SANCTIONS: A TALE OF THREE COUNTRIES

#### 3.1. INFORMATION DUTIES AND SANCTIONS

The first of the three countries to step up sanctions for social security fraud was the Netherlands, which introduced the *Wet boeten, maatregelen terug- en invordering Sociale zekerheid* in 1996. It was felt that various institutions charged with the administration of social security acts underperformed in enforcing social security obligations. New legislation was supposed to secure a break with the past by imposing a duty on the administration of social security always to recover every penny of undue payments and to always sanction violations of any obligation by withholding benefit payment or imposing fines. The Act gave rise to a system of enforcement governance, including obligations to develop anti-fraud policies, to monitor progress, and to report on this to the Ministry and then to Parliament. With this a whole enforcement bureaucracy evolved, with fraud officers, enforcement specialists and policy managers partly reporting to the office of the Attorney General. This branch of activity also extended beyond the national borders. The Dutch government imposed a ban on the export of benefits, but allowed for the conclusion of international agreements to make such export possible on the condition that the authorities of other countries would submit to the Dutch demands for control and information. All this had to be monitored. Sometimes Dutch fraud busting teams were sent out to pay visits to disabled or old age pensioners abroad, often to the great surprise of expatriates who left the country many years ago.

Despite the obvious progress in the field of enforcement,<sup>6</sup> in 2011 the Dutch government announced a new Act, the *Fraudewet*, with the aim of drastically increasing fines; and in the case of reoffending, barring those involved from the entire social security system. The latter proposal was strongly rejected by the Council of State because, in its view, it violated various constitutional principles. However, this did not deter the government from going ahead with the proposal, with only slight amendments.

In the final version of the *Fraudewet*, adopted by Parliament in 2012, fines are at least as much as the amount of benefit to be recovered, and higher for reoffenders. The claimant must pay this fine on top of the amount of benefit to be recovered. This is harsh. When one compares the severity of the sanctions in social security with sanctions applied in other fields of legislation, such as under the Health and Safety at Work Act or the Employment of Foreign Nationals Act, they are far higher. According to some, social security sanctions have spiralled out of control.<sup>7</sup>

<sup>6</sup> Noordam (2003).

<sup>7</sup> Tollenaar (2013).

In the UK, we find a very similar pattern of legislation as in the Netherlands.<sup>8</sup> The Social Security Fraud Act of 1997 introduced more powers to collect and exchange information, which established a system of criminal fines. In lieu of prosecution, the claimant is offered the chance to repay the amount fraudulently claimed, along with an additional 30 per cent of the overpayment. These powers and sanctions were increased by the Social Security Fraud Act of 2001, and then again by the Welfare Reform Act of 2009. There is now a system of benefit cuts in operation, which operates on the principle of one-strike and two-strike offences. One strike results in a one-month benefit withdrawal but, with two strikes, the claimant faces a much longer period without benefits.

In Germany, the legislative position in the area of information fraud has been less subject to change. The Germans rely on the consistency of the *Sozial-* and the *Strafgesetzbuch*, which include powers to collect information, and treat information fraud as a criminal offence.<sup>9</sup> If there has been any intensification of these anti-fraud measures, it has not come from the legislature, but rather from the administration, particularly the *Bundesagentur für Arbeit*, which continues to discover increasingly large numbers of irregular payments of *Arbeitslosengeld II*.<sup>10</sup>

### 3.2. CO-OPERATION DUTIES AND SANCTIONS

When it comes to co-operation duties, there has been a sharp increase in work-related obligations. In particular, the duty to work in exchange for benefit (instead of a regular job in the labour market) is a prominent feature of this. As relevant changes in this area in the three countries are systematically analysed by Anja Eleveld in her article on the duty to work without a wage,<sup>11</sup> I merely give a sketch of these developments.

Tougher work obligations without pay and tougher sanctions were first introduced in Germany as part of the systematic overhaul of the social assistance system by the Schröder government. The overhaul resulted in *Grundsicherung für Arbeitssuchende*, popularly referred to as *Hartz IV* (after the architect of the system, Peter Hartz), or more technically, as *Arbeitslosengeld II*. This system introduced minimum benefits, strict work conditions and tough sanctions for those not adhering to them. Part of the system is the *Arbeitsgelegenheiten mit Mehraufwandsentschädigung* (work opportunities with compensation for additional expenses), often referred to as the ‘one euro job scheme’. These are additional jobs created for *Hartz IV* recipients in the community sphere. The recipients keep their benefits and can earn one or two euros per hour in addition to this.

<sup>8</sup> For an overview, see McKeever (2009).

<sup>9</sup> Kreikebohm and van Koch (2012).

<sup>10</sup> Bundesagentur für Arbeit, *Jahresbericht Grundsicherung für Arbeitssuchende*, 2010, 2011 and 2012.

<sup>11</sup> See below in this issue of the journal.

In order to prevent the ‘one euro job scheme, from conflicting with German constitutional requirements, the activities and the rights of the beneficiaries have been carefully grounded in the law. For example, the work offered must be proportional and suitable for the beneficiary. The extent, mode and duration of the work carried out must be clearly circumscribed in a public law agreement concluded between the administration and the beneficiary. Health and safety must be protected and the person must be insured for occupational accidents. There is a two-year time limit, and the generally accepted maximum working week is 30 hours.

*Hartz IV* has been in operation for almost ten years without any substantial changes. Around 2010, some politicians, most notably the CDU *Ministerpräsident* of Hessen, Roland Koch, started a campaign to introduce a general *Arbeitspflicht* for *Hartz IV* recipients. But these voices were silenced by Angela Merkel, who remarked in the Bundestag: ‘*Ich glaube, dass die rechtlichen Rahmenbedingungen, was die Notwendigkeit der Arbeitsaufnahme betrifft, eindeutig ausreichend sind.*’ (‘I believe that the legal requirements with regard to the necessity of taking up employment are clearly sufficient’).<sup>12</sup> This was, seemingly, the end of the matter. And yes, the powers to impose sanctions against unwillingness to work included in *Hartz IV* are already quite severe, the minimum being a 30 per cent benefit cut, going up to a total withdrawal of benefit. In the meantime, as a result of changes introduced in 2012, there is no longer a requirement that mandatory work should improve the professional skills of the claimant; giving something back to the community is enough. According to Eleveld, this is typical of the latest generation of legislative changes, which have introduced obligatory work as a civic obligation.<sup>13</sup>

In the Netherlands, changes in the sphere of work duties have affected the unemployed, recipients of sickness pay and invalidity benefits, and social assistance recipients. As far as the latter are concerned, in 2004, the duty to accept suitable employment was replaced by a duty to accept ‘generally accepted employment’, a concept that is supposed not to take into account the nature of a person’s previous employment. Subsequently, workfare practices were introduced, made possible by the so-called participation jobs which force beneficiaries to work without any wages for the purposes of gaining work experience for a maximum of two years. 2012 saw the introduction of a so-called *maatschappelijk nuttige tegenprestatie*. This is a duty to make oneself available for community services in addition to the duty to find employment. The introduction of the *tegenprestatie* was accompanied by a bombardment of moralistic jargon: the reciprocity principle, everything comes at a price, *voor wat hoort wat*.<sup>14</sup> Sometimes the tone is more scornful; let them sweep up the leaves, or clear the snow! This language is mostly symbolic. Collecting autumn

<sup>12</sup> [www.faz.net/aktuell/wirtschaft/arbeitspflicht-fuer-hartz-iv-empfaenger-ein-basta-der-kanzlerin-zu-kochs-vorschlaegen-1910484.html](http://www.faz.net/aktuell/wirtschaft/arbeitspflicht-fuer-hartz-iv-empfaenger-ein-basta-der-kanzlerin-zu-kochs-vorschlaegen-1910484.html).

<sup>13</sup> PM.

<sup>14</sup> Corra (2012).



leaves is a highly professionalised business in the Netherlands, whereas snow clearing is difficult when everything has melted away within 24 hours.

In the meantime, patience with beneficiaries who fail to become active and find a job is clearly running out. Despite the fact that, under the present legislative system, municipalities have been given extensive opportunities to impose strict sanctions, politicians think this is not enough. The present Dutch government has announced a new Act which centrally prescribes tougher benefit cuts to which all local councils must adhere. In this way, the 2012 Fraud Act is going to have a younger brother in the form a Lex Discipline.<sup>15</sup>

In the United Kingdom, stricter co-operation duties are part of a wider trend that Peter Dwyer has described as ‘creeping conditionality’<sup>16</sup> – a pattern of formulating increasingly strict benefit conditions, thereby gradually undermining welfare rights for recipients. In social security the conditions mostly affect unemployed and single parents, but in Dwyer’s observations, other areas such as health, housing, education and welfare rights are also affected. The spiral of stricter co-operation duties and sanctions in social security was kick-started by policies introduced by Tony Blair’s government.

The British policies of conditionality have been formulated under the present coalition government. In 2011, Mandatory Work Activity was introduced, presented as a chance to develop work discipline and behaviour and to contribute to the local community. Once a claimant is referred to Mandatory Work Activity, participation is mandatory, and sanctions apply if a claimant fails to participate without good cause. The placements last for four weeks and for 30 hours a week. There are no wages.

The latest scheme is the Community Work Placements Programme. It is intended for people who have been unemployed for three years, due to a lack of work experience or motivation. Under this scheme it is possible to force claimants to perform community services for up to a maximum of 26 weeks, again for a maximum of 30 hours per week.

#### 4. BACKGROUND AND IMPLICATIONS OF THE NEW REPRESSIVE POLICIES

The spiral of obligations and sanctions can be interpreted in various ways. Some will point to the diminishing support among the population for, and a lack of solidarity

<sup>15</sup> The legislative changes will come into force on 1 January 2015 as part of the new *Participatiewet*. Actually, during the Parliamentary process the Dutch government had to back down somewhat on its plans, due to strong societal and political opposition to mandatory work activity. The introduction of an obligation to perform unpaid work activities (and impose corresponding sanctions) has been declared a competence of local government. In June 2014 the newly elected Amsterdam City Council decided not to impose any unpaid work activities. Conversely, some other municipalities are stepping up their efforts.

<sup>16</sup> Dwyer (2004).

with, some groups of welfare recipients, in particular with single parents, the long-term unemployed, and immigrants and asylum seekers.<sup>17</sup> Others will argue that the new repressive policies are rooted in the need to reform social security, by making the system more active and by reducing costs.

An alternative explanation comes from the Dutch sociologist Willem Trommel,<sup>18</sup> who points to structural changes which undermine the old welfare state, such as globalisation and individualisation, and argues that these changes give rise to a new social governance. This is, in Trommel's terms, 'a greedy government', which is characterised by a state that desperately tries to restore the social fibre of society. A characteristic of its' policies is that the state is trying to mould society into a uniform pattern of values and norms so as to create a responsible civil society using a top-down approach.

The French sociologist Loïc Wacquant makes an equally interesting remark when he points to the role played by the symbolism of repressive welfare policies, particularly in the USA.<sup>19</sup> According to Wacquant, this symbolism is important from the point of view of the legitimacy of the state. By constantly pointing the finger at those who are not deserving of our support – the unruly classes, the outcasts, the irresponsible, newcomers to society, and worst of all, fraudulent immigrants – the state attempts to strengthen the bond with the rest of the population, thereby creating a basis for its survival.

Such theories offer an alternative to the mainstream marketing arguments for tougher obligations and sanctions doled out by politicians. Indeed, there are good reasons for being critical of these mainstream arguments. Here I mention five of these reasons.

First of all, the new policies are not always based on empirical evidence or rational considerations. For example, the latest Dutch Fraud Act was a response to political pressure, not at all to increasing levels of fraud and abuse. In fact, the figures show that these have not increased at all. It is also quite shocking to note how often fraud cases are reported to the press, suggesting large scale illegal practices involving losses of millions of euros, while in the end such cases appear simply not to exist. Thus, in the Netherlands, only 12 Moroccans and Turks appear to have claimed double child benefit, not a quarter of the relevant populations, as was earlier suggested by some politicians.<sup>20</sup> Similarly, in Amsterdam, after two years of researching address data, it appears there were only six so-called 'phantom citizens' claiming benefits, instead of the hundreds suggested previously.<sup>21</sup> Remarkably, no politician is ever held to account

<sup>17</sup> See, for example, van Oorschot (2006).

<sup>18</sup> Trommel (2009).

<sup>19</sup> Wacquant (2009).

<sup>20</sup> Sociale Verzekeringsbank: evaluatie onderzoek uitwonende kinderen in Turkije en Marokko, 2008, available at [www.journalistiekennieuwemedia.nl/NC/?p=742](http://www.journalistiekennieuwemedia.nl/NC/?p=742).

<sup>21</sup> Barth (2013).

for spreading rumours which subsequently prove to be manifestly exaggerated or downright false.

Secondly, it should be pointed out that the call for higher fines is made on the assumption of wrongful behaviour which, in practice, cannot always be upheld. Not all recipients who do not adhere to the rules are intentional fraudsters. There is a difference between intentionally and unintentionally violating obligations;<sup>22</sup> the extent of error may far outreach the extent of fraud;<sup>23</sup> and suspected fraud is not the same as the real extent of fraud.<sup>24</sup> Some people just get confused by the rules or experience events in their lives that make them unfit to do what is expected of them.<sup>25</sup> Perhaps it is also for this reason that local administrators often find it hard to impose the tough sanctions that are prescribed by central guidelines.<sup>26</sup>

Thirdly, new repressive policies can come with an overdose of paternalistic interference, which damages the dignity of benefit claimants. Thus, the former Dutch Secretary of State for Social Affairs, Henk Kamp, made a serious point in describing how social assistance recipients should dress.<sup>27</sup> They are not supposed to show piercings, tattoos, *décolletés* or belly buttons, let alone heads scarves or burkas, otherwise they are not attractive to employers. However, research has pointed out that, in practice, it is very hard for social services to enforce such instructions, borne out of the fantasies of some correct politicians.<sup>28</sup> In Britain, the popular press targets, for example, people who are overweight. No dole for fatties.

Fourthly, the repressive welfare state reforms are so focused on discipline and sanctions that they undermine the balance between rights and obligations, thus exposing claimants to benefits to unwarranted intrusions of their privacy, the arbitrary decisions of fraud officers and degrading treatment. In the end this may jeopardise the 'elevating function' social security is supposed to have for citizens. For example, in our research into the implementation of the latest Dutch mandatory work activity programme, we found that there are fewer regulatory guarantees for this type of work than for the obligatory community services that must be carried out by detainees. In this way, social security and criminal law will become mutually exchangeable areas of government concern. The British government at least introduced a set of quality guarantees for the British Mandatory Work Activity Scheme. There are internal guidelines which deal not only with working times and health and safety matters, but which also require that the work is beneficial for the development of the claimant,

<sup>22</sup> Reindl-Krauskopf and Meissnitzer (2013).

<sup>23</sup> van Stolk and Elmerstig (2013).

<sup>24</sup> van Oorschot and Roosma (2013).

<sup>25</sup> Gustaafson (2012).

<sup>26</sup> For the Netherlands, den Uijl, Tollenaar, Bröring, Kwakman, and Keulen (2012).

<sup>27</sup> As echoed by legislative proposals made by the present Dutch government.

<sup>28</sup> Research carried out by the Dutch Social and Cultural Planning Office, *Verzorgd uit de bijstand, De rol van gedrag, uiterlijk en taal bij de re-integratie van bijstandsontvangers*, SCP 29 August 2012.

and that it does not go against his or her personal beliefs or lead to any degrading practices.<sup>29</sup>

Finally, one should not turn a blind eye to the possibility that the harsh policies may force people to move underground, to resort to marginal activities in the shadows of the official society, to beg and to sleep rough. If the system loses faith in the citizens, the citizens may lose faith in the system, thus giving rise to a new underclass which does not rely on the formal safety net. There is no empirical evidence of such a causal link between sanctions and homelessness, or at least none that I am aware of, but it may very well be just one more factor underlying the growing incidence of extreme poverty in Europe.<sup>30</sup>

## 5. RESPONSE OF THE JUDICIARY

As mentioned in the introduction, it is important that the new repressive welfare policies operate under the rule of law, which can help to maintain a just balance between rights and obligations for benefit claimants. In this respect, it is relevant to monitor the response of the judiciary to these new policies.

It emerges that the courts are very much in the business of counterbalancing the new sanctions regime, both in cases of information fraud and in cases of suspected abuse. This is not only the case in the Netherlands,<sup>31</sup> but also in the UK<sup>32</sup> and in Germany. A common theme in the case law is that each individual case must continue to be judged on its merits, however strict and standardised the rules may be. When individual circumstances are taken into account, very often the conclusion must be that sanctions should be mitigated. For example, legal commentators in the Netherlands predict that the Courts will never be in the position to uphold the severe sanctions that the legislature has introduced by means of the *Fraudewet* of 2012.<sup>33</sup>

Another trend, at least in the Netherlands, is that case law is becoming more constitutional in character, meaning that courts do not refrain from taking a principled stance, and derive rules from fundamental rights. One of the reasons for this may be that the basis for the rights in the social security statutes themselves has become so weakened by constant legislative interference that courts must almost always resort to higher legal norms, in particular, human rights standards, as a basis for their decisions. Examples of the more principle-based case law are the rulings dealing with the powers of the administration to enter the homes of claimants for

<sup>29</sup> Mandatory Work Activity Provider Guidance – Incorporating Universal Credit (UC) Guidance (August 2013), available at [www.dwp.gov.uk/docs/pg-part-p.pdf](http://www.dwp.gov.uk/docs/pg-part-p.pdf).

<sup>30</sup> [epp.eurostat.ec.europa.eu/statistics\\_explained/index.php/People\\_at\\_risk\\_of\\_poverty\\_or\\_social\\_exclusion](http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/People_at_risk_of_poverty_or_social_exclusion), accessed at 27 February 2014.

<sup>31</sup> Vonk (2012; 2013).

<sup>32</sup> McKeever (2009).

<sup>33</sup> Stijnen commenting on Central Appeals Tribunal, 27 March 2013, AB 2013/412.

verification purposes. According to the Dutch Central Appeals Tribunal, this is not permitted, unless the occupant gives his explicit consent.<sup>34</sup> Failure to do so may not result in any loss of benefit rights, unless there is a clear indication that there is something wrong with the payment of benefit. In typical fashion, the Dutch legislature has reacted to this with a new Act to grant more powers to the administration to enter people's homes, but it is questionable whether this is really going to be successful, as the courts will probably remain critical.

Another interesting theme in case law deals with the question of whether it is permissible to force beneficiaries to accept workfare duties, for which beneficiaries receive no, or reduced, earnings. The question arises as to what extent this is in line with some fundamental rights, such as the right to work (in particular, the freedom of occupation) and the prohibition of slavery and forced labour, as contained in several international human rights instruments, such as Article 4 ECHR.

For a long time there were hardly any national or international cases in which the concrete decisions of social security administrations to withhold benefit rights were considered to be in violation of any of these rights. The general understanding seems to be that work duties may be imposed as a benefit condition, and that withholding benefit rights does not impede someone's freedom of occupation, let alone constitute forced labour. Up to now this has also been the point of view of the European Court of Human Rights.<sup>35</sup>

I have some trouble in accepting the way courts tend to reject outright the relevance of the prohibition on forced labour in social security cases. First, by doing so, courts fail to appreciate the great responsibility that rests on them to protect the proper balance between rights and obligations following the introduction of workfare policies. Secondly, case law does not recognise that withholding benefits rights may constitute a serious form of pressure and coercion on the person involved. According to the European Court of Human Rights, forced labour is 'labour exacted under menace of any penalty and performed against the will of the person involved, that is doing work for which he has not offered himself voluntarily.'<sup>36</sup> I fail to see why, under some circumstances, particularly long-term benefit dependency, sanctions would not amount to such a penalty. In the light of this argument it is interesting to observe that some courts seem to be adopting a more critical attitude.

In the Netherlands, the first court to create a breakthrough was the District Court of Arnhem.<sup>37</sup> The case dealt with a social assistance beneficiary with an academic background who had been told to accept certain activities, offered to him by the 'training centre', a facility set up under the work-first programme of the town of

<sup>34</sup> See the cases of 11 April 2007 by the Central Appeals Tribunal, *inter alia*, LJN BA2447.

<sup>35</sup> ECHR No. 30300/96, decisions of 26 February 1997, *J.H. Talmon v. the Netherlands*, EHRLR 1997, 448–449; and more recently, ECtHR in the decision of 4 May 2010 in *Schuitmaker v. the Netherlands*, Application No. 15906/08.

<sup>36</sup> ECtHR judgement of 23 November 1983, *Van der Musselle v. Belgium*, para 34.

<sup>37</sup> Court of Arnhem, 8 October 2008, LJN BF 7284.

Arnhem. The claimant was told to sign a 'job experience agreement', under which he was given the choice of either working as a public gardener (weeding, hoeing), or packing boxes of super glue. He had signed the agreement, but subsequently refused to co-operate in the activities imposed on him by his 'case manager'. This resulted in a penalty of a 40 per cent benefit cut, for a period of one month. In its judgment, the Court came to the conclusion that the practices of the local council of Arnhem were not contrary to the prohibition on slavery and forced labour contained in Article 4 ECHR. The fact that the workfare activities were not voluntary because they were imposed under the threat of a sanction did not alter this conclusion, because, according to the Court, social assistance is merely a safety net which presupposes that a person will return to paid employment as soon as possible. But while, on the one hand, the Court ruled that, in this case, the activities offered should not be considered as disproportionate and excessive, it did, on the other hand, envisage that work-first practices may run contrary to Article 4 ECHR, i.e. in the case of a beneficiary who is forced to carry out activities under threat of a sanction for a longer time, when it is clear that such activities are in no way conducive to reintegration into the regular labour market.

Later, in another case, the Central Appeals Tribunal upheld the rationale of the Arnhem Court and offered a more extensive abstract framework for deciding when workfare may run contrary to the prohibition of forced labour.<sup>38</sup> This is a new approach in the case law.

In the meantime, the UK Supreme Court has delivered a judgment on the lawfulness of mandatory Work Activity.<sup>39</sup> The case was brought by an unemployed geology graduate, Miss Caitlin Reilly. She was doing voluntary work in a museum, but was then forced to take on unpaid work in a Poundland store in Birmingham. After a couple of days work, she quit, because she was not learning anything from doing this menial work. The Supreme Court rejected the argument that the work activity was forced labour within the meaning of Article 4 ECHR. According to the Court, the case law of the ECtHR clearly presupposes that the activities should somehow be degrading. Thus, quoting from the *Van der Musselle* case, the Supreme Court ruled:

‘To amount to a violation of Article 4, the work had to be not only compulsory and involuntary, but the obligation to work, or its performance, must be “unjust”, “oppressive”, “an avoidable hardship”, “needlessly distressing” or “somewhat harassing”.’

Nonetheless, the Supreme Court upheld the judgment of the lower courts that the Mandatory Work Activity scheme ran contrary to the Act of Parliament. Lower legislation just repeated the vague terms of this Act, instead of providing further rules. Actually, the judgment of the Supreme Court in the *Poundland* case has now been reversed by the Jobseekers (Back-to-Work Schemes) Act 2013, which purports to

<sup>38</sup> *CR v. B*, 8 February 2010, *LJN* BL1093.

<sup>39</sup> [2013] UKSC 68, UKSC, 2013/0064.

have retroactive effect. The full implications of this Act have yet to be worked through and there is ongoing litigation. On 4 July 2014 the Queen's Bench Division of the High Court of Justice (administrative court) found that the retroactivity of the repairs run contrary to Articles 6 and 1 of the First Protocol of the ECHR.<sup>40</sup>

In Germany, the 'one euro' job scheme under *Hartz IV* was tested in 2008 by the *Bundessozialgericht*.<sup>41</sup> This case dealt with a 58-year-old engineer who had to place protective casing around young trees for a local council company in Bavaria. For this work, he only received a small compensation fee. He refused to do the work because his 30-hour working week made it impossible for him to apply for a regular job. This argument was rejected by the Court on grounds that the labour was organised by the local community for public purposes, and had to be regarded as additional work.

Referring to case law, it is interesting to make a small excursion to consider a ruling of the Czech Constitutional Court of 27 November 2012.<sup>42</sup> In this case the argument of forced labour played a prominent role. This was a case brought by some opposition MPs in the Czech Parliament against a Mandatory Labour Programme in the Czech Republic. The MPs complained that this scheme was against the Forced Labour Convention of the ILO, the prohibition on forced labour of the ECHR, and the very right to social security itself. The Czech Court's decision is a remarkable one. It smashed the scheme to bits, holding that benefit cuts were a disproportional means of forcing people to accept work that was forced upon them by the authorities.

The Czech ruling is an uncompromising and unique one, made possible by the harshness of the mandatory work scheme that had been introduced. In the Czech Republic, people who are unemployed for longer than two months have to accept any unpaid labour. If they refuse, they are removed from the employment register, which has the effect that they lose their benefits all together. Except in some exceptional cases, claimants have no influence over the work or the conditions under which it has to be carried out. According to the Court:

'the state treats them in the same manner as persons sentenced for a crime, only for the reason that they became unemployed and are exercising their legal rights, without violating any legal obligation. Therefore, the obligation to accept an offer of public service does not serve to limit social exclusion, but to intensify it, and it can cause those performing it, whose work has the same elements externally (for other people) as serving a sentence, humiliation to their personal dignity.'

This is a relevant judgement which I would recommend to any person who is interested in workfare policies. Many aspects also pertaining to the work schemes in other countries were critically scrutinised: the curious status of the labour relationship, the

<sup>40</sup> [2014] EWHC 2182 (Admin).

<sup>41</sup> BSG, 16 December 2008 AZ: B 4 AS 60/07 R.

<sup>42</sup> Available in the English language at: [www.usoud.cz/fileadmin/user\\_upload/ustavni\\_soud\\_www/Decisions/pdf/Pl\\_US\\_1-12.pdf](http://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Decisions/pdf/Pl_US_1-12.pdf).



risk of arbitrary practices, the coincidental nature of the type of jobs available, and the argument that the work must be done for the purposes of work training. Many of the arguments defending such aspects were completely rejected or refuted.

One wonders what the Czech Court would have thought about the Mandatory Work Programmes applicable in the Netherlands, Germany and the UK. Would they have passed the test? The 'one euro' job scheme probably would, by reason of its strict regulation of rights of beneficiaries in the SGB. Perhaps the Mandatory Work programme would, if only because of the short duration for which the work has to be carried out (30 hours a week for four weeks). But what about the Netherlands, where the *maatschappelijk nuttige tegenprestatie* may be imposed for an unlimited duration in a way which is left virtually unregulated by law?

What we can learn from the fresh approach of the Czech Court is that the rights of claimants under the workfare schemes should be made explicit. The work should not be degrading, there should be some right of choice, the work should benefit the claimant, individual circumstances must be taken into account as well personal beliefs, working conditions and working times should be adhered to, etc. These things must be regulated in the law, not just in internal guidelines like the ones that exist in the UK, or not simply unregulated, as was the case in the Czech Republic, and still is the case in the Netherlands' *maatschappelijk nuttige tegenprestatie*.<sup>43</sup>

It is lessons such as these which illustrate exactly what role the judiciary can play in counterbalancing the rise of the repressive welfare state.

## 6. CONCLUSION

In this article we discussed the trend of introducing increasingly strict obligations and sanctions for social security claimants in Germany, the Netherlands and the UK. It was argued that such a welfare state must be looked upon in a critical way because it upsets the balance between rights and obligations in social security and may result in degrading treatment and an undermining of the 'elevating function' of social security. The article also includes a number of other criticisms: there is no empirical evidence which supports the need to introduce repressive policies; there are negative consequences in terms of stigmatisation; the policies turn a blind eye to beneficiaries who fail to adhere to obligations unintentionally; and there is a risk of persons dropping out of the formal social security system altogether.

Courts play an important role in maintaining the balance between rights and obligations. We have discussed some examples of case law in the three countries, but the champion of all courts is the Czech Constitutional Court, which, in November 2012, led the way to a more fundamental human rights approach to scrutinising

<sup>43</sup> A first case of a lower Dutch court is indeed highly critical of the *maatschappelijke nuttige tegenprestatie* as a ground for imposing work duties. See Court of Zeeland-West-Brabant, 25 February 2013, LJN BZ5171.



repressive welfare state excesses. Yet, it must be borne in mind that the role of the courts should not be overestimated. Thus, for example, when it comes to the duty to perform unpaid work under the threat of sanctions, the government has considerable leeway to develop schemes according to their beliefs and preferences without meeting any constitutional objections. In ECHR terms, this leeway is expressed as the state's 'margin of appreciation' and its 'legitimate aims'. Also the 'proportionality test' operates as a mitigating factor. The result is that only in extreme cases where individual rights are infringed, can courts offer a remedy. But otherwise, the judiciary in itself is not in a position to curb the rise of the repressive welfare state. In this light, the judgement of the Czech Constitutional Court is, indeed, exceptional.

For those who attach importance to a balance between rights and obligations in social security, the latter observation is a disconcerting one. If government policies upset this balance without meeting any structural opposition, neither from parliament nor from the courts, how can it be restored so that vulnerable beneficiaries will be better protected against the popular mood of political majorities? Here lies a major task for all actors who operate independently, outside the grasp of official political institutions. The judiciary is one of those actors, but not the only one. If we want to turn the tide of the repressive welfare state, a wider coalition must be forged: academia, the critical press, citizen's initiatives, complaints authorities, and, last but not least, those who are usually the very last to be heard when discussing welfare policies, the beneficiaries themselves.

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# THE DUTY TO WORK WITHOUT A WAGE: A LEGAL COMPARISON BETWEEN SOCIAL ASSISTANCE LEGISLATION IN GERMANY, THE NETHERLANDS AND THE UNITED KINGDOM

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## **Abstract**

*Since the rise of the activation paradigm in the 1990s, the duty to work without a wage has become widespread in European social assistance legislation. This paper investigates in a precise way the extent to which the duty to work without a wage follows the legal logic of a contractual relationship and how this duty is related to the fundamental right to an adequate standard of living. A comparison between German, Dutch and British social assistance legislation shows that the duty to work without a wage increasingly takes the form of a reciprocity requirement. That is, instead of re-integrating into regular paid work, recipients of social assistance are required to show that they are worthy of attaining basic social rights, not only by improving their capability to work but, above all, by showing a willingness to work. It concludes that the duty to work without a wage enhances governmental control over recipients of social assistance rather than improving their employability and notes that, in this respect, the Dutch social assistance regime seems to be stricter than the German and British ones.*

**Keywords:** activation policies; legal comparison; social assistance; social rights; workfare

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## 1. INTRODUCTION

Since the 1990s, an increasing number of European welfare states can be characterised in terms of the activation paradigm. Comparative social policy studies have shown that this new paradigm of social policy has induced a shift away from a solidaristic (and passive) welfare state towards an active and enabling welfare state, whose main goal is the re-integration of welfare recipients into paid employment (Betzelt and Bothfeld 2011; Serrano Pascual and Magnusson 2007; Stendahl *et al* 2008; Van Berkel *et al.* 2011). Some have applauded the rise of this new paradigm, as it aims to improve the employability of welfare claimants, while still guaranteeing a minimum level of protection (Hemerijck 2013). On the other hand, others have asserted that we are seeing a process of convergence to a workfare approach (Handler 2003, 2009; Jessop 2002), which, amongst other things, changes the role of the state from being a guarantor of social rights to being the regulator of individual's rights (Betzelt and Bothfeld 2011; Serrano Pascual and Magnusson 2007). Legal scholars have pointed, in particular, to the changed contractual relationship between welfare claimants and governmental agencies. Whether these contracts are called a 're-integration agreement' or a 'claimant commitment', they make it clear, first and foremost, that the right to safety net benefits is conditional on the behaviour of the recipient of social assistance (Eichenhofer 2013). However, according to some legal scholars, the image of the contract does not match reality. Whereas, theoretically, contracts are founded on the idea of the rational self-determining agent who voluntarily enters the contract on equal terms with the other party, the 're-integration agreement' and the 'claimant commitment' are based on asymmetric power relations (Freedland and King 2003).

The central aim of this paper is to determine how the duty to work without a wage in social assistance legislation formally restructures (basic) social rights in the contractual relationship between recipients of social assistance and governmental agencies in three European welfare states: Germany, the Netherlands and the UK. Usually analyses of activation policies are pursued from a socio-economic perspective, answering questions about the (side) effects of a certain rule or policies. In that approach, questions belonging to a more legal perspective, like legitimisation, legal logic and fundamental rights, tend to be neglected. Departing from a legal perspective, this paper investigates in a precise way the extent to which the duty to work without a wage follows the legal logic of a contractual relationship, and how this duty is related to the fundamental right on an adequate standard of living or social assistance, as it has been laid down in, *inter alia*, Article 11 ICESR, Article 13 ESC and Article 34 (3) of the Charter of the Fundamental Rights of the EU. As such, this analysis aims to shed light on the aforementioned views on the activation paradigm: the approach that stresses the impact of social investment on the employability of recipients of social assistance *versus* the approach that stresses the emergence of the controlling state. It is to be hoped that the analysis will help the formulation of some issues for a future rights-based research agenda.

This paper is organised in the following way. In Section 2, different kinds of activation policies in Europe are briefly examined, and the choice of Germany, the Netherlands and the UK justified. Sections 3 and 4 present the results of the legal comparative study. Section 5 analyses the results of this study. Finally, Section 6 outlines a socio-legal research agenda on the duty to work without a wage.

## 2. COMPARING SOCIAL ASSISTANCE ACTIVATION POLICIES IN EUROPE

Comparisons between the national social policies of European welfare states are commonly based on Esping Anderson's three worlds of welfare capitalism (1990), which describes three different types of welfare state: First, a liberal regime that is based on utilitarian market principles. Entitlements to social benefits are targeted, needs-based and means-tested, and the replacement rates are low. Second, a social democratic or universalistic regime that is citizenship-based, and where entitlements to social benefits are universal and replacement rates are generous. Third, the Bismarckian or conservative regime, which is based on an employment-related social insurance and usually premised on the conventional male breadwinner family.

Some scholars have argued that Esping Anderson's classification is not suitable for the analysis of activation policies, because the regime types do not reflect the diversity of activation policies that have been adopted by Member States (Lødemel and Trickey 2001; Van Berkel 2011). Nevertheless, when it comes to the implementation of activation policies, researchers tend to distinguish between two main types, which mirror Esping-Anderson's first two types of welfare regimes: on the one hand a universalistic type (representing the Scandinavian countries), which combine high benefits, universal welfare provisions and active policy instruments; and on the other hand, a liberal type, representing countries such as the UK and Ireland. In these latter countries benefits are much lower and social assistance as a last resort is relatively important. The liberal type shares its emphasis on activation measures with the universalistic type. However, whereas the universalistic type emphasises incentives and social investment (also called the 'carrot approach'), the liberal type instead predominantly deploys strict sanctions to 'activate' welfare dependants – 'the stick approach' (Barbier and Knut 2010; Larsen 2005).

This dichotomy is not unproblematic. First, even universalistic type countries, renowned for their human capital investment policies, increasingly base their activation policies on the stick approach.<sup>1</sup> As a matter of fact, the duty to work without a wage often possesses both stick and carrot elements. On the one hand, it aims at human capital investments that prepare people to enter the regular labour market. On the other hand, it is implemented to prevent people from applying for social benefits,

<sup>1</sup> With respect to Denmark see Jorgenson (2009).

or to create an incentive for welfare recipients to find a regular job as soon as possible (Van Berkel 2006). A second reason why the dichotomist classification is problematic is that it fails to categorise countries belonging to Esping Anderson's Bismarckian or conservative regime, such as Germany, Belgium and France. According to Barbier and Knut (2010), it remains to be seen if these countries will develop into a third ideal type.

Regarding the shortcomings of this Esping Anderson based classification system for a comparative analysis of activation measures in social assistance legislation, I propose to use the classification of Cantillon and Van Mechelen (2011). These authors divide the social assistance legislation of 27 EU countries into four groups with respect to the degree to which active labour market policies are pursued (Cantillon and Van Mechelen 2011):<sup>2</sup>

1. countries, such as Estonia and Lithuania, where national social assistance regulations are neither activated nor sanctioned;
2. countries, such as the UK and Romania, where social assistance policies combine strong financial incentives with strict sanctions;
3. countries, such as the Netherlands and Denmark, which have integrated large numbers of recipients of social assistance into activation programmes, and which tend to impose a relatively high number of sanctions; and
4. countries, such as Belgium, Austria and Germany, where the numbers of recipients of social assistance targeted is substantially lower than in the Netherlands or Denmark, despite this fourth group's use of activation measures.

The countries selected for this study represent the second, third and fourth groups (i.e. the UK, the Netherlands and Germany).<sup>3</sup>

There are also other reasons which justify the selection of these countries. For example, all selected countries intensified their activation policies between the late 1990s and 2005. As a result of these reforms, these countries have either introduced or extended the possibility of working without a wage in social assistance legislation, such as the new deal in the UK (1998), the Hartz reforms in Germany (2003–2005), and the Work and Welfare Act (WWB) in the Netherlands (2004). Yet, as will be shown, there is some variation with respect to the implementation of the duty to work without a wage.

<sup>2</sup> Only Croatia, which became part of the EU in 2013, is not included in this study.

<sup>3</sup> Note that, regarding the selected countries, the classification of Cantillon and van Mechelen does not necessarily differ much from Esping Anderson's classification. Studies updating Esping Anderson's classification in order to take account of activation policies also categorise these countries into separate welfare regimes (Powell and Barrientos 2004; Sapir 2006). These studies classify Germany as a corporatist regime, the Netherlands as a universalistic regime, and the UK as a liberal regime.

### 3. A LEGAL COMPARISON OF THE DUTY TO WORK WITHOUT A WAGE, AS IMPOSED ON RECIPIENTS OF SOCIAL ASSISTANCE IN GERMANY, THE NETHERLANDS AND THE UK

Social assistance legislation comes under different names. Following Bieback (2009), I define social assistance legislation as those provisions that regulate needs-related (cash) benefits. In all investigated countries, the recipient of social assistance who is required to work without a wage engages in some kind of contractual relations with a governmental agency. There is some variation in the way the relationship between the recipient of social assistance and the governmental agency is structured. The Netherlands has the highest degree of decentralisation, which means that rules on re-integration, sanctions, etc. are delegated to the municipal level, where local officials enjoy some degree of discretion on re-integration measures and sanctions (Eleveld and Van Vliet 2013). In Germany and the UK, social assistance and activation programmes are much more centralised. Most social assistance schemes are usually operated jointly by the Federal Employment Agency and the municipalities, and, as in the Netherlands, officials enjoy some degree of discretion (Becker and Von Hardenberg 2010). The UK allows the lowest degree of administrative discretion. Even judges have little scope to develop law, given the very prescriptive nature of much of the social legislation (Harris 2010). The Department for Work and Pensions (DWP) is responsible for activating recipients of social assistance, with implementation undertaken by Jobcentre Plus and carried out by external contractors.

In this section, I discuss different legal aspects of the requirement to work without a wage in social assistance legislation in Germany, the Netherlands and the UK: first, the legal basis of the duty to work without a wage in national social assistance legislations, including its contract form (Section 3.1); second, the personal scope of application (Section 3.2); third, the maximum length of the duty to work without a wage (Section 3.3); and fourth, the shift from re-integration to civic requirement (Section 3.4). The following section (Section 4) is entirely dedicated to a central aspect of the contractual relationship between the recipient of social assistance and the governmental agency, namely the sanctions for non-compliance with the duty to work without a wage.

#### 3.1. THE LEGAL BASIS OF THE REQUIREMENT TO WORK WITHOUT A WAGE

The Netherlands currently has the most straightforward social assistance scheme, which operates under the Work and Welfare Act (WWB). Alongside this scheme there is a special statutory scheme (WAJONG) that provides social assistance to young people with a disability, which I do not address in any further detail in this article. From 1 January 2015 these schemes will be integrated into a single, comprehensive



scheme, the Participation Act. The requirement to work without pay is regulated under Article 9(1b) of the *WBB*, which requires recipients of social assistance to participate in an employment programme if this is offered to them as part of their re-integration plan. Under Article 10(a) of the *WBB*, a municipality can also oblige certain welfare recipients to perform work activities in 'participation placements'. Lastly, Article 9(1c) of the *WBB* stipulates that they can be required to perform non-remunerated activities that benefit the community.

Germany has two separate social assistance schemes: Social Code II (*SGB II*) and Social Code XII (*SGB XII*). These reflect the earlier distinctions between the non-deserving poor (i.e. those able to work) and the deserving poor (i.e. those unable to work) (Eichenhofer 2008). In this paper I focus on *SGB II*, which applies to employable people and their partners. Article 16(d)(1) of the *SGB II* stipulates that claimants can be required to participate in *Arbeitsgelegenheiten in der Mehraufwandsvariante* (i.e. work opportunities). These work opportunities refer to 'one euro jobs' which pay between 1 and 2 euros an hour.

The UK has various different social assistance schemes, including Jobseeker's Allowance (JSA), Employment and Support Allowance (ESA), Income Support (IS), Housing Benefits (HB) and Universal Credit (UC). In this paper I refer only to UC, as this scheme is due to replace the other income-based benefits by 2017.<sup>4</sup> UC is regulated by the Welfare Reform Act 2012 (WRA 2012) and the UC Regulations 2013. Welfare claimants can be required to participate in 'work preparation programmes' under Article 16(3)(d) WRA 2012, while also being subject to some specific regulations under the Mandatory Work Activity programme.

All legislatures have adopted some form of contractual structure in which social assistance recipients have to agree to perform labour activities. These re-integration agreements (Germany), re-integration plans (the Netherlands) and claimant commitments (the UK) generally record the requirements placed on a claimant in return for payment of social assistance. They usually also stipulate what happens if the claimant does not comply with these requirements. It should be noted that Germany and the UK formulate the requirement to sign an agreement more strictly than the Netherlands, where the *WBB* states that a claimant *can* be required to sign a re-integration plan.<sup>5</sup> In the UK the right to receive benefit is conditional upon the claimant's making a signed commitment,<sup>6</sup> while the German *SGB II* requires the Job Centre to enter into a re-integration agreement with the claimant.<sup>7</sup>

<sup>4</sup> Note that contribution-based JSA and ESA will exist alongside UC from 2017.

<sup>5</sup> However, claimants under 27 must sign a re-integration plan.

<sup>6</sup> Article 14(1) WRA 2012. A claimant who refuses to accept the commitment will not be entitled to UC. However, according to the Explanatory Memorandum for the Social Security Advocacy Committee (12 June 2012), claimants will be allowed a 'cooling off' period to give them the opportunity to reconsider and understand the consequences of their decision.

<sup>7</sup> Article 15 *SGB II*. Note that, under this Article, if there is no '*Eingliederungsvereinbarung*' (i.e. re-integration agreement), the job centre should issue a '*Verwaltungsakt*' (i.e. administrative decision). According to the Federal Social Court, the re-integration agreement or administrative decision



### 3.2. PERSONAL SCOPE

The spread of the activation paradigm across Europe has involved the targeting of new groups, such as disabled people and lone parents, who now constitute ‘the undeserving poor’ (Harris and Wikeley 2007; Stendahl 2008). This tendency is also evident in the social assistance legislation and practices in Germany, the Netherlands and the UK. For example, at the start of the financial crisis, the four largest cities in the Netherlands imposed the duty to work without a wage on recipients of social assistance who were previously classified as not being able to re-integrate in regular paid work within a period of five years (Divosa 2008, 2009). Still, there is some variation between the investigated countries with respect to the personal scope of the duty to work without a wage.

In principle, all social assistance claimants in the investigated countries who are aged 18 or older are required to work.<sup>8</sup> The German law adds an extra condition in that the person eligible for worker status must be employable; in other words, the social assistance recipient must not be unable to work within a foreseeable period. In addition, the claimant must be capable of being employed for at least three hours a day. The various pieces of national legislation also allow some exemptions from the requirement to perform labour activities without a wage. The most important of these exemptions applies to people whose capacity to work is limited for physical, psychological or mental reasons.<sup>9</sup> Under the new Participation Act, however, only welfare recipients who are fully and permanently incapacitated will be exempted from the requirement to work without a wage. This is much stricter than the criteria currently applied in the Netherlands and the criteria applied in Germany and the UK.<sup>10</sup>

Recipients of social assistance performing care duties are exempted from worker status to some degree in each country’s legislation. There is some variation with respect to the exemption of persons caring for young children. In the UK, UC claimants who are responsible for a child under the age of five cannot be required to work without a wage.<sup>11</sup> In Germany, parents responsible for a child under three are entirely exempted

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should provide clear information on the work the claimant has to perform, the location where the work is to take place, the time and date when the activities will start, the duration in terms of the number and distribution of weekly hours and the amount of the compensation. (BSG 16 December 2008 B 4 AS 60/07 R.).

<sup>8</sup> Article 9(1) *WWB*; Article 7 *SGB II*; Article 9 UC Regulations. Note that, under the UC Regulations, 16- and 17-year-old claimants can also get UC if they are not in education.

<sup>9</sup> For details of the German regulation, see Article 10(1) *SGB II*. For details of the British regulation, see Article 9 UC Regulations 2013. Under current Dutch Article 9(2) *WWB*, the municipality may exempt recipients of social assistance from the duty to work without a wage if there are urgent reasons. Claimants with a limited capability to work often invoke Article 9(2) *WWB*. In 2013 30 per cent of the recipients of social assistance were exempted from the duty to work under the *WWB*.

<sup>10</sup> See Article 9(5) *Participation Act*.

<sup>11</sup> Arts. 19 and 20 *WRA* 2012 and Arts. 89 and 91 UC Regulations 2013.

from the worker status.<sup>12</sup> Under the Dutch *WWB*, it is, to a certain extent, at the discretion of the municipality whether lone parents are temporarily exempted from their participation in re-integration activities such as the duty to work without a wage.<sup>13</sup> This implies that lone parents with new-born children can be required, in theory, to perform this duty. On the basis of the Participation Act, lone parents with young children will – at the discretion of the municipality – only be exempted from the duty to perform a civic job (see Section 3.5).<sup>14</sup> They cannot be exempted from their participation in re-integration activities. Yet, compared to Germany and the UK, more providers of care to young children are required to work without a wage.

There is also a difference between, on the one hand, Germany and the UK, and, on the other hand, the Netherlands, when it comes to other care providers' requirement to work without a wage. Then, in contrast to the Dutch *WWB*, the German and British regulations exempt recipients of social assistance who are responsible for caring for other dependants from the requirement to work without a wage.<sup>15</sup> The British legislation is quite explicit in temporarily exempting other groups, such as pregnant claimants, adopters, foster parents and students, from this requirement.<sup>16</sup> Claimants who work in a minimum-wage job for at least 16 hours a week, and whose earnings are not sufficient to meet their day-to-day cost of living, are also exempted from the requirement to work without a wage. In the Netherlands, by contrast, it is not unusual for recipients of social assistance to have to work without a wage in addition to holding a regular job (FNV 2012).

### 3.3. THE LENGTH

In Germany, the requirement to accept 'one euro jobs' may be imposed on recipients of social assistance for a maximum of two years within a five-year period.<sup>17</sup> This limitation in time was introduced by an amendment that was implemented on 1 April 2012 in order to prevent long-term participation in 'one euro jobs' and to emphasise the priority of regular jobs.<sup>18</sup> The maximum of two years is substantially longer than the maximum of three months during which claimants could be required to participate in work programmes before the introduction of Hartz IV in 2005. Although the German legislation does not stipulate the number of hours that a claimant can be required to

<sup>12</sup> The term 'responsible parent' refers both to a lone parent and to the person in a couple who has been nominated by the couple as being responsible for the child. For the definition of 'responsible parent' in British law, see Article 19(6) WRA.

<sup>13</sup> Article 9(2) *WWB*. The legislator has narrowed this leeway for municipalities by words like 'only under strict conditions' and 'insofar the limitations cannot be solved by childcare services'.

<sup>14</sup> See Article 9(2) and Article 9 (7) Participation Act.

<sup>15</sup> Article 10(1) point 4 *SGB II*, Article 19(2b) WRA and Article 89(1c) UC Regulations.

<sup>16</sup> Article 89 UC Regulations.

<sup>17</sup> Article 16(d)(6) *SGB II*.

<sup>18</sup> *Drucksache* 17/6277, p. 116.

work in a ‘one euro job’, a maximum of 30 hours a week seems to be common (Hohmeyer and Jozwiak 2008; Jäger and Thomé 2013), and has also been allowed by the courts.<sup>19</sup>

In the Netherlands, it is up to the municipalities to decide what kind of employment programmes to offer. Initially it was only possible to oblige social assistance claimants to work under Article 9(1)(b) *WWB*, which imposed a general requirement on social assistance claimants to cooperate with a re-integration programme. Usually these placements did not last for longer than six months, and sought to achieve quick re-integration into regular employment. The fear that longer work project placements might confer employment rights on welfare beneficiaries prompted the government, in 2008, to introduce Article 10(a) *WWB*. This allows municipalities to oblige recipients of social assistance to work without a wage in ‘participation placements’ for up to four years. Participation placements are designed for recipients of social assistance whose chances of finding a regular job are relatively low and who need more time to prepare themselves for the labour market.<sup>20</sup> Recipients of social assistance who fail to find a regular job after a six-month placement under Article 9(1)(b) can be required to work in a participation placement for a further four years.<sup>21</sup> As a result, recipients of social assistance can be required to work without a wage for four and a half years. In practice, claimants are commonly required to work without a wage for between 16 and 36 hours a week (FNV 2013; Kok and Houkes 2011).

The best-known ‘work preparation programmes’ in the UK are the Work Programme and the Mandatory Work Activity scheme. The Work Programme started in April 2011, and is designed to assist claimants at risk of becoming long-term unemployed. Under the programme, private providers help claimants to get back into work by providing job search support, skills training and work placements designed to benefit the community.<sup>22</sup> Claimants aged 25 or older can be required to enter a Work Programme after being unemployed for 12 months. The Work Programme is for a maximum of two years.

The other new programme, the Mandatory Work Activity scheme, was also introduced in 2011. This scheme provides four weeks of work (or work-related activity) for up to 30 hours a week, and is ‘aimed at those who require extra support to help them re-focus their approach to job search and gain work-related disciplines’, such as ‘attending on time and every day, following instructions, working in teams’ and so on.<sup>23</sup>

The new scheme, the Community Work Placements Programme, is targeted at claimants who have been unemployed for three years. It is no coincidence that this

<sup>19</sup> BSG 16 December 2008 B 4 AS 60/07 R.

<sup>20</sup> Parliamentary Papers 30 650 No. 3.

<sup>21</sup> Article 10(a)(3) *WWB*.

<sup>22</sup> Jobseeker's Allowance (Schemes for Assisting Persons to Obtain Employment) Regulations 2013/276, Article 3(8).

<sup>23</sup> Explanatory Memorandum to the Jobseeker's Allowance (Mandatory Work Activity Scheme) Regulations 2011, points 2 and 7.3. See also Article 2(1) of the Jobseeker's Allowance (Mandatory Work Activity Scheme) Regulations 2011 (2011/688).

scheme started on 28 April 2014, two years after the launch of the Work Programme, which had a maximum length of two years. The Community Work Placements Programme is designed for claimants whose key barriers to work are their lack of work experience, lack of motivation, or both. Public, private and volunteer organisations will place claimants in work for 30 hours a week for up to 26 weeks (DWP 2013). Hence, in the UK the recipient of social assistance can be required to work without a wage for a period of up to two years and 30 weeks, which is substantially longer than the six months of wage subsidy provided under Tony Blair's New Deal programme of 1998.<sup>24</sup>

In fact, all investigated countries have extended the length of the duty to work without a wage fairly recently. The question can be raised as to whether this extension has improved the chances of finding a stable regular job. Scant research does not provide evidence of the re-integration into paid employment because of a long-term requirement to work without a wage (Crisp and Fletcher 2008).<sup>25</sup> The duty to work without a wage only seems to have a positive effect on the re-integration of men into regular employment at the very start of the programme (the 'stick effect'), and between weeks 10 and 25 of unemployment (Graversen and Van Ours 2008; Pedersen *et al* 2012). There also seems to be a group of welfare beneficiaries that constantly moves between poorly paid jobs and a welfare situation (Bruttel and Sol 2006; Eichorst and Konle-Seidl 2008). In Dutch policy language persons belonging to this group are called 'flex beneficiaries' (Divosa monitor 2008 and 2009). In Section 5 I will further reflect on this issue.

### 3.4. RECIPROCITY

In 2012 the Dutch government introduced the 'civil community job' in social assistance legislation.<sup>26</sup> According to the government, the civil job entails a 'civic requirement in return for the solidarity people receive from the community'.<sup>27</sup> As the government contended, the principle of reciprocity is more appropriate in a more participative society in which everyone contributes according to his or her ability, and where citizens take responsibility not only for their own lives, but also for the society in which they live.<sup>28</sup> Hence, the primary goal of civil community jobs is not to reintegrate claimants into regular jobs, but instead to get them to do something in return for their

<sup>24</sup> Claimants who are seriously disadvantaged in the labour market, including those who have recently received incapacity benefit, may be required to enter the Work Programme after three months of unemployment (Work Programme Provider Guidance, Chapter 2, Annex A, updated 26 November 2012).

<sup>25</sup> Research in the Netherlands has shown that the regional labour market is more effective for re-integration into regular paid employment than municipal re-integration policies (Edzes 2010).

<sup>26</sup> Article 9(1)(c) WWB.

<sup>27</sup> Parliamentary Papers, 2011–12, 32815, No. 3, 14–15.

<sup>28</sup> Parliamentary Papers, 2013–14, 33801, No. 3.

allowances. According to the Participation Act, all municipalities will be required to develop municipal policy on civil community jobs.<sup>29</sup> The Participation Act imposes a number of conditions on the requirement to perform civil community jobs: (1) the performance of civil community jobs should not impede the re-integration of the recipient of social assistance into regular jobs; (2) the length of these activities should be limited;<sup>30</sup> and (3) the municipalities are required to take individual circumstances into account in case they impose the requirement to perform civil community jobs. That is, the recipient of social assistance should be physically, psychologically and mentally capable of performing this job. The municipality does not, however, need to take account of recipients of social assistance' previous work experience.

Despite the fact that the German and British have not implemented the civic requirement into their social assistance legislation, legal and political changes indicate that also in these countries, the duty to perform work without a wage no longer exclusively serves the goal of re-integration into a regular job. For example, whereas the aim of the German 'one euro jobs' is to increase employability and opportunities to participate in the regular labour market,<sup>31</sup> a recent amendment revoked a clause that required 'one euro jobs' to contribute to improving claimants' professional knowledge and skills.<sup>32</sup> We also find evidence for a turn to a civic requirement in the parliamentary history. In 2008, for example, the German government argued, in response to questions from the left-wing opposition, that the goal of 'one euro jobs' was not only to reintegrate the unemployed into regular jobs, but that performing 'one euro jobs' also served as an act of reciprocity by welfare beneficiaries towards the community.<sup>33</sup> In addition, in 2011 the German Parliament started a petition requiring employable welfare recipients to perform public labour activities in return for their allowances, while imposing sanctions on those refusing to participate or failing to turn up on time.<sup>34</sup> At the same time, the responsible Minister, Von der Leyen (CDU), stated that the unemployed should be expected to do something in return for their monthly allowance funded by taxpayers.<sup>35</sup>

We find a comparable trend in the UK. The Mandatory Work Activity Provider Guidance, for example, states: 'A community benefit placement must be of benefit to the community over and above the benefit of providing a placement to the individual.'<sup>36</sup> In addition, according to the government's guidance on Mandatory Work Activity: 'There is no work experience element for the MWA scheme, instead there is a work

<sup>29</sup> Article 7 (3) Participation Act.

<sup>30</sup> The Court of Breda has ruled that a 32-hour working week is too long for such jobs (Court of Breda, 25 February 2013, *LJN BZ 5171*).

<sup>31</sup> *Drucksache* 17/622:115.

<sup>32</sup> Amendment of Article 3(2) *SGB II* of 1 April 2012.

<sup>33</sup> DB 16/8934.

<sup>34</sup> Petition 16634. *Gemeinnützige Arbeit für Arbeitslosengeld II-Empfänger*, 17 February 2011.

<sup>35</sup> *Frankfurter Allgemeine*, 20 January 2010.

<sup>36</sup> These words are in bold type in the Mandatory Work Activity Provider Guidance, Chapter 1, Annex 1, A1.3.

placement for community benefit.<sup>37</sup> This suggests that that a reciprocal act by the claimant towards the community is even more important than the extent to which the work placement contributes to the claimant's chances of finding a regular job. This turn towards reciprocity is confirmed in the new political discourse. For instance, in 2008 the Conservatives, who were still in opposition at the time, argued that they would 'not allow anyone claiming Jobseekers Allowances over a long period to do nothing' (Conservative Party 2008:34). And in 2013, Chancellor George Osborne, announcing the new Community Work Placements Programme, reiterated the language used by the Conservative Party five years earlier, arguing that: 'There is no option of doing nothing for our benefits, no something-for-nothing anymore.'<sup>38</sup>

#### 4. SANCTIONS

In the contractual relationship between the recipient of social assistance and the governmental agency, sanctions have a central place. If the recipient of social assistance fails to do her part of the agreement (i.e. to work without a wage), the governmental agency may also refrain from ITS' part of the agreement (i.e. to pay benefits). In all three countries, sanctions can be imposed on recipients of social assistance who do not show up for work, who arrive late, or who otherwise misbehave at their designated place of work. Usually this means that their allowances will be cut. In this section I compare the amount of the sanction, the implemented hardship clauses and the effect of a sanction on the amount of the benefit.

##### 4.1. THE AMOUNT OF THE SANCTION

The German and British legislators have laid down the sanctions in legislation. Sanctions can be imposed on recipients of social assistance in Germany if they refuse to perform reasonable labour activities (i.e. to take 'one euro jobs') without a good reason.<sup>39</sup> The sanction amounts to a three-month reduction of their allowances by 30 per cent for a first failure to work, with any second or third failure being punished by cuts for three months of 60 per cent and 100 per cent, respectively.<sup>40</sup>

In the UK, a low-level sanction can be imposed if a claimant fails to meet a work preparation requirement, such as participation in the Work Programme, without good reason.<sup>41</sup> The sanction of a cut of 100 per cent in the allowance can be imposed for an indefinite number of days, starting on the date the sanctionable action took place, and

<sup>37</sup> Advice for Decision Making, Chapter K3, K3037.

<sup>38</sup> Speech by Chancellor Osborne, 30 September 2013.

<sup>39</sup> Article 31(1) *SGB II*.

<sup>40</sup> Article 32(a)(1) and 31(b)(1) *SGB II*. The sanctions are slightly different for welfare beneficiaries under 25.

<sup>41</sup> Article 27 WRA 2012.

ending no earlier than the date on which the claimant fulfils the condition. A fixed-period sanction of between 7 and 28 days may also be imposed. Higher fixed-period sanctions apply if a claimant fails to meet a Mandatory Work Activity without good reason. In that case a higher-level sanction of 100 per cent may be imposed for 91 days. In the event of a second failure to comply, a reduction may be applied for 182 days.<sup>42</sup>

In the Netherlands, municipalities reduce the benefits in accordance with their municipal regulations.<sup>43</sup> Municipal regulations usually allow allowances to be cut by 20 per cent for one month in the event of a minor failure, but the reduction may rise to 100 per cent. Although the Central Appeals Tribunal (CRvB), which is the highest appeal court for social security cases in the Netherlands, has forbidden the imposition of indefinite sanctions, it has, nevertheless, allowed a sanction of 100 per cent for seven months.<sup>44</sup> The new Participation Act will reduce much of the municipal discretion in this respect. From 1 January 2015, municipalities will be required to reduce allowances by 100 per cent for one month if social assistance claimants do not comply with re-integration duties.<sup>45</sup> In the case of recidivism, allowances may be reduced by 100 per cent for three months.<sup>46</sup> The municipal sanction system with respect to the civic requirement will not be altered.

#### 4.2. HARDSHIP REGULATIONS

In some cases, imposed sanctions can be softened by hardship regulations. In Germany, for example, beneficiaries whose allowances are cut by more than 30 per cent can apply for supplementary benefit in kind. Although it is up to the Job Centre to decide whether to grant this, it is required to grant it if the household includes minor children.<sup>47</sup>

In the UK, beneficiaries upon whom sanctions have been imposed may claim hardship payments (which are usually recoverable) if they cannot meet their immediate and most basic and essential needs or those of a child for whom they are responsible, providing the claimant (now) meets all work-related requirements.<sup>48</sup> In addition, the sanction may also be reduced by 40 per cent in certain situations, such as if the sanctioned person is responsible for providing care.<sup>49</sup> The DWP may also visit claimants considered vulnerable, such as those with a mental health condition or a

<sup>42</sup> Article 26 WRA 2012.

<sup>43</sup> Article 18(2) *WWB*.

<sup>44</sup> CRvB 3 July 2012, RSV 2012/210.

<sup>45</sup> See Article 18(5) Participation Act.

<sup>46</sup> See Article 18(6), 18(7) and 18(8) Participation Act.

<sup>47</sup> Article 31(a)(3) *SGB II*.

<sup>48</sup> Article 28 WRA; Article 116(2) and (3) UC Regulations and Article 16(d)(2)(b-d) and (3) SS (LB) Regulations.

<sup>49</sup> A 40 per cent reduction can also be granted in the event of pregnancy (in the final 11 weeks of pregnancy), childbirth (in the first 15 weeks after childbirth), and if the claimant has adopted a child in the previous 12 months (Article 111(1) UC Regulations).



learning disability, before applying a sanction, in order to establish whether there is a good reason for the failure to comply.

Under the Dutch *WWB*, sanctioned recipients of social assistance can only claim hardship payments in very exceptional circumstances.<sup>50</sup> In practice, these kinds of claims hardly ever succeed. For example, in a recent case where the municipality imposed a sanction of 100 per cent for six months, the Central Appeals Tribunal dismissed an appeal on a general hardship clause, notwithstanding the presence of dependent children, major debt problems and imminent eviction.<sup>51</sup> Nonetheless, the new Participation Act contains hardship clauses similar to those in the German and British regulations. For example, according to this Act, a municipality may revise the 100 per cent cut before the sanction period has ended, if the beneficiary now complies with the mandatory activities.<sup>52</sup> The municipality can also decide to reduce the sanction in the event of urgent reasons, such as further marginalisation, debt problems and eviction.<sup>53</sup> And, like the German and British legislation, special attention has to be paid to family interests in case sanctions are imposed.<sup>54</sup>

#### 4.3. THE EFFECT OF A SANCTION ON THE AMOUNT OF THE BENEFIT

It is important to notice that the effect of a sanction of 100 per cent is not the same for all investigated countries. That is, for a full understanding of the possible impact of sanctions, we need to take a closer look at the composition of the allowances. Social assistance allowances in the Netherlands comprise a single monthly sum, the amount of which depends on the composition of the household. The German and British allowances, on the other hand, contain differing elements. Whereas, in the Netherlands, the sanction is imposed on the total monthly sum received, the sanctions in Germany and the UK are imposed only on the cost of living allowance (Germany)<sup>55</sup> or the standard allowances (UK).<sup>56</sup> In the case of Germany, this means that sanctioned recipients of social assistance retain their entitlement to, *inter alia*, allowances for women who are more than 12 weeks pregnant, extra allowances for lone parents,<sup>57</sup> allowances for reasonable costs of rent and heating,<sup>58</sup> and extra allowances for children under 16 who are living in the household.<sup>59</sup> In the UK, sanctioned

<sup>50</sup> Article 16 *WWB*.

<sup>51</sup> CRvB 17 December 2013, 12/3121 *WWB*, USZ 2014/28.

<sup>52</sup> Article 18(7) Participation Act.

<sup>53</sup> Article 18(6) Participation Act. See also the Parliamentary Papers 2013–14, 33801, No. 3. 3.

<sup>54</sup> Article 18(8) Participation Act.

<sup>55</sup> Article 31(a)(1) *SGB II* and Article 20 *SGB II*.

<sup>56</sup> Article 111(1) UC Regulations.

<sup>57</sup> Article 21(2) *SGB II*.

<sup>58</sup> Article 22 *SGB II*.

<sup>59</sup> Article 23 *SGB II*.



recipients of social assistance retain their entitlement to additional allowances for children and housing costs.<sup>60</sup>

The differences between the systems can be illustrated by the example of a workable, unemployed lone parent with two children aged seven and nine in the household. For the purposes of the example, we will assume that the person pays monthly rent of € 350, with heating costs of € 100 a month. If this person receives a 100 per cent sanction because of refusing to attend a designated work project, the sanction hits hardest in the Netherlands, where the total allowance received will reduce by 69 per cent (from € 1338.61 to € 412.14). This is much higher than in Britain, where the reduction will be 25 per cent (from € 1484.15 to € 1112.60), and Germany, where the reduction will amount to only 21 per cent of the total allowance (from € 1847.52 to 1465.52).<sup>61</sup> The relative reduction depends, first of all, on factors such as the number and age of children living in the household. In addition, as Table 1 demonstrates, the cost of the rent also slightly reduces the differences between the countries.<sup>62</sup>

**Table 1. Reduction of total allowance after 100 per cent sanction**

Rent	Germany	the Netherlands	the United Kingdom
€ 200	23%	77%	28%
€ 350	21%	69%	25%
€ 500	19%	64%	23%

## 5. CONCLUSION

The analysis in Sections 3 and 4 has shown that the contractual relationship between recipient of social assistance and government agencies in Germany, the Netherlands and the UK has been restructured in important ways. First, the personal scope of the programmes has been extended, as a result of which more and more people a long distance from the labour market are subjected to the contractual duty to work without a wage. Second, there is a tendency to extend the length of the programmes to work without a wage, as a result of which recipients of social assistance can be required to perform work activities without receiving a wage for consecutive years. At the same time, evidence from empirical research raises doubts as to whether this extension positively

<sup>60</sup> Housing costs are fully subsidised, providing the rent is reasonable and the house is not too large.

<sup>61</sup> I have taken into account all social assistance benefits and allowances the claimant receives for the children, housing and heating. Amounts are based on the monthly rates in 2013 (GBP 1 = EUR 1.19, 16 November 2013). Sources used: [www.missoc.org](http://www.missoc.org), [www.belastingdienst.nl](http://www.belastingdienst.nl) (consulted on 25 November 2013), Jäger and Thomé (2013) and Child Poverty Action Group (2013/2014).

<sup>62</sup> For Germany and the United Kingdom, I assumed that a rent of € 500 was considered reasonable, since this is a condition for receiving rent subsidy.

affects the chances of finding a regular paid job. In fact, the first and the second trend are in line with a third trend, according to which the duty increasingly takes the form of a reciprocity requirement. That is, instead of re-integrating into regular paid work, the recipient of social assistance is increasingly expected to do something in return for her benefits. This probably explains why the extension of the personal scope and the length of the requirement to work without a wage has not met with much resistance.

The shift to reciprocity also reveals the increased significance of the contract: in order to receive benefits, recipients of social assistance are required, first, to show that they are worthy of attaining basic social rights, not only by improving their capability to work, but, above all, by showing a willingness to work. However, instead of reflecting the contractual norms of consent and voluntariness, this contract is characterised by an imbalance of power relations: if the recipient of social assistance refuses to fulfil her part of the contract, she either loses her safety net benefits or faces a sanction that amounts to a temporary loss of these benefits. This leaves the recipient of social assistance with no choice other than to comply with the duty to work without a wage. Only in cases where recipients of social assistance obtain regular paid jobs will they be able to enter a contractual relationship with the government on fairly equal terms. Until they reach that stage they are in fact 'virtual citizens' who are 'in an active state of becoming full citizens' (Schinkel 2010; Schram 2010). Indeed, recipients of social assistance, especially those who are required to work without a wage, are bound to be treated differently from 'full citizens', which means, *inter alia*, that their social rights are constantly at risk of being curtailed. In conclusion, the shift to reciprocity has increased the significance of the idea of in the duty to work without a wage. Importantly, this idea of contract does not follow the legal logic of a contractual relationship in which parties enter the contract voluntarily and on equal terms. Instead, recipients of social assistance are at risk of losing fundamental rights. Not only because they may lose access to the fundamental right on an adequate standard of living or social assistance, but also because, being treated as second class citizens, they risk losing access to other basic (social) rights as well. Both points are addressed in the agenda for future research (Section 6). If we return to the two views outlined in the introduction, this analysis seems to endorse the view that the new contractual relationship first and foremost reinforces control mechanisms, which enhance the role of the state as the regulator of the behaviour of welfare claimants. What about the other view, which stresses the positive effects of social investment and improvements in the employability of recipients of social assistance? There are two issues that call for discussion in this respect. First, the shift from re-integration to reciprocity shows that the duty to work without a wage is not necessarily related to an enhancement of the human capital of recipients of social assistance. Second, the question can be raised as to whether people really need more than four years of 'on the job training' before they are able to perform (very) low-skilled jobs. And likewise, should the 'flex beneficiary', who moves between low skilled jobs and social benefits, be 'retrained' every time for the same low-skilled jobs?

This analysis does not provide hard conclusions with respect to the extent to which the duty to work without a wage enhances the human capital of recipients of social assistance. To address this issue properly would require more empirical evidence that provides answers to questions such as:

1. What is the (structural) effect of the duty to work without a wage on the employment rate? Due to the fact that studies designed to answer this question would need a control group, there are not many (European) studies available measuring structural effects, in particular with respect to the effects of long-term requirement to work without a wage.
2. What is the education and work experience of recipients of social assistance who are required to work without a wage, and to what extent do these characteristics match the content of the work programme?<sup>63</sup>

Anyway, it is clear that, in the Netherlands, the restructuring of the contract between the recipient of social assistance and the government agency has not resulted in increased (financial) efforts of the government to enhance the employability of recipients of social assistance. Instead, since the introduction of *WWB*, expenditures for active labour market policies in the Netherlands have constantly dropped (Eleveld and Van Vliet 2013).

If the conclusion that the duty to work without a wage enhances governmental control over recipients of social assistance instead of improving their employability is right, the Dutch social assistance regime seems to be stricter than those in the other two countries. This is remarkable, regarding what might be expected from the classification used by Cantillon and Van Mechelen (2011). The Dutch legislation not only allows long-term work programmes to start earlier than in the UK, but also allows for longer programmes and longer working weeks, with fewer exemptions from the requirement to work without a wage. In addition, the sanctions in the Netherlands are higher, and the Netherlands is the only country that has introduced civic jobs that are not specifically intended to help claimants to enter the labour market.

### 5.1. RESEARCH AGENDA

It was not possible to cover all legal issues with respect to the contractual duty to work without a wage in social assistance legislation. Therefore in this section I want to design a future agenda for social-legal research on the duty to work without a wage. In my opinion this agenda should at least address the following issues:

<sup>63</sup> Inquiries of the largest Dutch labour union have revealed that the imposition of the duty to work without a wage on recipient of social assistance with fairly recent job experience is not unusual (FNV 2012; FNV 2013).

1. *The question of the extent to which the duty to work without a wage may be in breach of the prohibition on compulsory labour in Article 4 ECHR and ILO Convention 29.*<sup>64</sup> This question is interesting, in particular from the perspective of contract. The metaphor of the contract, then, does not hold, if recipients of social assistance are in fact required to perform certain labour activities.
2. *The formal employment rights of the recipient of social assistance who is required to work without a wage.* Employment rights are often justified because of the unequal bargaining position of employees (Davidov and Langille 2011). Along these lines it could be argued that recipients of social assistance should be entitled to even more protective rules, because their contractual position is more vulnerable than that of employees. However, the reverse is the case. Legal research can pinpoint gaps in protective rights between, on the one hand, employees, and on the other hand, recipients of social assistance.
3. *The employment protection of the recipient of social assistance in practice.* Although recipients of social assistance may formally enjoy some (employment) rights, it is not at all clear to what extent these rights are enforced on the work floor. Socio-legal (ethnographic) research could be helpful in mapping the extent to which formal legal rights are enforced in practice.
4. *The use of 'good reason' clauses and hardship clauses.* As far as access to social rights is concerned, hardship clauses would seem to help ensure sufficient levels of income for sanctioned recipients of social assistance, particularly if children are involved. However, further research is needed to establish what counts as a 'good' reason, and how hardship clauses are interpreted by the court.
5. *The effect of invoking fundamental social rights.* The question that needs to be answered here is whether fundamental social rights can provide a counterweight to unbalanced contractual relations between recipients of social assistance and governmental agencies.

I believe these are the five core issues for future socio-legal research on the duty to work without a wage in social assistance legislation. Together with two socio-economic research questions mentioned in Section 5, I have provided a list of at least seven subjects for future research. It is important to note, though, that it is impossible to protect the position of working recipients of social assistance using formal legal rules alone. There will always remain a margin of discretion within which recipients of social assistance who are required to work without a wage are at the mercy of the governmental agency and/or the 'employer'. As mentioned above, ethnographic research may be helpful in mapping the circumstances of these recipients of social assistance.

<sup>64</sup> For Dutch ruling see: *CRvB* 8 February 2010, LJN BL 1093; RSV 2010/79. For British ruling see: [2012] EWHC 2292 (Admin); [2013] EWCA Civ. 66; [2013] UKSC 68. For German ruling see: Articles 12(2) and (3) of the German Constitution. See *BSG*, 16 December 2008 B 4 AS 60/07 *SozR* 4-4200 para. 16 No. 4; *BSG* 13 April 2011 B 14 AS 101/10 R *SozR* 4-2000 para. 16 No. 8. Also see the article by Vonk in this issue.

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# INCREASING PENSION AGES IN GREECE AND IRELAND: A QUESTION OF LEGITIMATE EXPECTATIONS

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## Abstract

*This paper examines the changes to pension ages in Greece and Ireland precipitated by the global financial crisis and introduced as a result of the Greek and Irish bail-outs. The paper analyses whether pensioners in the two jurisdictions had a legitimate expectation that such changes would not occur or whether they had a legitimate expectation that such changes would not be introduced without transitional measures. It concludes that, while there is no existing legal protection of the legitimate expectation in either case, there are some moral arguments in support of the introduction of transitional measures to ensure that pensioners can make the necessary adjustments to their financial affairs in the light of the changes in pension law.*

**Keywords:** administrative law; legitimate expectations; pension age; pension law; transitional arrangements

## 1. INTRODUCTION

The European financial crisis, precipitated by the wider global economic crisis, has had a significant influence on the social rights of residents of the EU. Illustrative of this impact are the alterations to the pension age in many EU Member States. While many Member States were considering such changes to the pension age as a consequence

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of demographic transformation and its financial impact, in some cases, the change occurred much quicker, conditional upon financial aid from the EU and the IMF. Greece<sup>1</sup> and Ireland<sup>2</sup> were the first Member States to seek and receive financial aid from the EU and the IMF. However, these financial aid packages also included conditions, often negotiated very quickly, to increase pension ages in Greece and in Ireland (although both Ireland and Greece had been considering such a change prior to these events). In Greece, the general pension age of 65 years increased to 67 years from 1 January 2013, without the introduction of any transitional period, and special treatment for some specific groups was abolished.<sup>3</sup> Ireland, on the other hand, saw an increase in the normal pension age, with a shift from 65 years to 66 years in 2014 and with further shifts to occur in 2021 and 2028.<sup>4</sup>

The rise of the retirement age affected the stability and predictability of the law in both jurisdictions since prospective pensioners, who had organised and planned their economic affairs based on a lower retirement age, now face very uncertain circumstances. In social states, such as Greece and Ireland, the necessity that legal provisions are governed by consistency and coherence is protected by the principle of legitimate expectation. The purpose and function of the concept of legitimate expectation is similar in many jurisdictions on the grounds that ‘the law should protect the trust that has been reposed in the promise made by an official. Good government depends upon trust between the governed and the governor. Unless that trust is sustained, protected officials will not be believed and individuals will not order their affairs on that assumption’.<sup>5</sup> The German concept of *Vertrauensschutz* also highlights the importance of trust as a central purpose of the doctrine of legitimate expectation. Schroeder has commented that the protection of legitimate expectations in English law (and similarly Irish law) ‘is derived from the principle of *Vertrauensschutz*, which seeks to ensure that “everyone who trusts the legality of a public administrative decision should be protected”’.<sup>6</sup> Similar references to trust and confidence can be identified in the case law of the Court of Justice of the European Union where the principle of legitimate expectation ‘extends to any individual where, by giving him

<sup>1</sup> The EU offered its first financial support to Greece on 25 March 2010 and Greece sought financial support on 25 April 2010. A loan package of € 110 billion was agreed on 2 May 2010. Greece also received a further financial aid package on 21 February 2012. See European Central Bank, “Key Dates of the Financial Crisis”, available at [www.ecb.int/ecb/html/crisis.en.html](http://www.ecb.int/ecb/html/crisis.en.html).

<sup>2</sup> Ireland sought financial support on 21 November 2010 and a package of measures was agreed on 7 December 2010. This included a loan package of € 85 billion. Details are available at [http://ec.europa.eu/economy\\_finance/articles/eu\\_economic\\_situation/2010-12-01-financial-assistanceireland\\_en.htm](http://ec.europa.eu/economy_finance/articles/eu_economic_situation/2010-12-01-financial-assistanceireland_en.htm).

<sup>3</sup> For further details, see Section 2.1 below.

<sup>4</sup> For further details, see Section 2.2 below.

<sup>5</sup> Forsyth (2011: 2).

<sup>6</sup> Schroeder (2002: 119).

precise assurances, an institution has led him to entertain reasonable expectations'.<sup>7</sup> The notion of the principle of legitimate expectation is also recognised as a general principle of European Law.<sup>8</sup> According to Advocate General Cosmas, the principle of legitimate expectation requires the legislature and the national authorities to exercise their powers over a period of time in such a way that situations and relationships lawfully created under national law are not affected in a manner which could not have been foreseen by a diligent person.<sup>9</sup> However, the protection of legitimate expectations is not an absolute right<sup>10</sup> and therefore, there will be cases where the legislator is allowed to increase the normal retirement age, taking into consideration e.g. the demographic changes occurring in the country or the on-going changes in economic and social circumstances, particularly, during an economic crisis.

This paper examines three distinct questions based on the doctrine of legitimate expectation in Greek and Irish law. Firstly, did prospective pensioners in EU Member States and, in particular, Greece and Ireland, have a legitimate expectation that the law relating to pensions would not be amended? Secondly, did prospective pensioners have a legitimate expectation that the law relating to pensions would not be amended without the introduction of sufficient transitional measures? Thirdly, if such a legitimate expectation exists, can it be protected under Article 1, Protocol 1 of the European Convention on Human Rights (ECHR)? This paper analyses this question through case studies of the legal situation in both Greece and Ireland. The paper begins with a legal analysis of pension ages in the chosen states both prior to, and after, the EU and IMF bail-outs. This analysis reveals the extent of the alterations made to pension ages in both Member States as a result of the bail-out agreements. Secondly, the paper addresses one particular legal claim that may be available to prospective pensioners in Greece and Ireland, namely the doctrine of legitimate expectation.

The paper concludes, in relation to the first question, that the doctrine of legitimate expectation is unlikely to be of assistance to prospective pensioners in Ireland or in Greece, due to the current interpretation of the doctrine in both jurisdictions. In both Greece and Ireland, the prospective pensioner will be met by the argument that the expectation is either not legitimate, is a fetter on the discretion of the executive or is not in the public interest, in light of the severe economic conditions prevailing in the state. In relation to the second question, it concludes that a claim for some reasonable notice or transitional measures will face similar legal obstacles, although

<sup>7</sup> *Van den Bergh en Jurgens and Van Dijk Food Products (Lopik) v EEC* (Case C-265/85) at para 243 and *Joined Cases T-66/96 and T-222/97 Mellett v Court of Justice* [1998] ECR-SC I-A-449 and II-1305, at para 104, *French Republic (T-427/04) and France Télécom SA (T-17/05) v Commission of the European Communities* at para 259.

<sup>8</sup> C- 104/1989, *Mulder and other v Council of the European Communities and Commission of the European Communities*, Judgment of 19 May 1992 at para 15.

<sup>9</sup> Opinion of advocate General Cosmas, delivered on 8 June 1995, C- 63/93 *O' Donovan v Minister for Agriculture and Others* at paras 24 and 25.

<sup>10</sup> Becker and Von Hardenberg (2009:118).

there appears to be some general acceptance that transitional measures are desirable, at least in Ireland. Finally, the paper concludes that a prospective pensioner will not have a claim under the ECHR, due to the uncertain basis of the legitimate expectation claim in national law.

## 2. PENSION AGE: PRE AND POST CRISIS

Pension ages across EU Member States diverge greatly and have undergone substantial alteration over the decades.<sup>11</sup> Ireland is an interesting example as it introduced a pension age of 70 years in 1908<sup>12</sup> which it then lowered to the current age of 65 years in the 1970s. In Greece, the pension age was set at 65 in 1951. This pension age applied mainly to men working in the private-sector. The pension ages of civil servants and other privileged groups were much lower and rather diverse.<sup>13</sup> This section of the paper outlines the current pension ages in Ireland and Greece and the changes precipitated by the EU and IMF financial agreements.

### 2.1. PENSION AGE IN GREECE AND THE RECENT LEGISLATIVE CHANGES

Within the framework of the financial facility agreements, the EU, in cooperation with the IMF, advised Greece to implement stringent fiscal and monetary policies. To meet the conditions of the loans, Greece has had, *inter alia*, to re-arrange its pension system, given that 'pensions are the dominant part of social security and they form a significant component of the entire Greek macro-economy'<sup>14</sup>, by increasing the normal and early retirement age. The new pension law (Law No. 4093/2012), which came into force in January 2013, foresees an extension of two years to the statutory retirement age, bringing the pension age to 67 in most cases.<sup>15</sup> The early retirement age will increase from the age of 55 years (or, in some exceptional cases, earlier than 55 years) to the age of 62 years.<sup>16</sup> Furthermore, civil servants, who were previously allowed to receive a pension at any age, as long as they could prove that they had 35 to 37 years of service, will now receive a pension when they reach the age of 67 years.<sup>17</sup>

<sup>11</sup> OECD (2011).

<sup>12</sup> Old Age Pension Act 1908. For a more detailed consideration of pensions in Ireland see Whelan (2005).

<sup>13</sup> E.g. the civil servants appointed before 31 December 1982 and retired before 31 December 1997 could retire at the age of 55 years for men and 53 for women. See Explanatory Report of Law 2084/1992 of 31 August 1992, at p. 1.

<sup>14</sup> Börsch-Supan and Tinios (2002: 361).

<sup>15</sup> Law 4093/2012, Official Journal (OJ) of 12 November 2012, Fascicle A 222, as amended by Law 4111/2013, OJ of 25 January 2013, Fascicle A 18.

<sup>16</sup> Law 3863/2010, OJ of 15 July 2010, Fascicle A 115, as amended by Law 4093/2012.

<sup>17</sup> Law 4093/2012, Article 1 A.

No transitional measures were put in place for those close to the retirement age, apart from those who had reached the age of 65 years by the 31 December 2012.

Of significant interest for the purposes of this paper is the fact that the extension of two years in the normal retirement age (from 65 to 67) was legislated for without the introduction of any transitional periods. The non-introduction of transitional measures arose as a result of the pressures precipitated by the financial agreement and increasing public debt. However, this raises significant legal questions which are addressed below.

## 2.2. PENSION AGE IN IRELAND AND RECENT LEGISLATIVE CHANGES

While the changes to the pension age in Ireland are less complex, they are no less significant. Conditional upon the EU/IMF Programme of Financial Support for Ireland<sup>18</sup> and the Irish Memorandum of Understanding on Specific Economic Policy Conditionality<sup>19</sup>, Ireland agreed to implement structural reforms to increase progressively the state pension age<sup>20</sup> from the standard age of 65 years to the age of 68 years.<sup>21</sup> This was to be achieved through a number of measures, including the abolition of the State Pension (Transition) from 2014, which is available to persons aged 65. The State Pension (Transition) was available on fulfilment of certain criteria, among which is that the individual claimant must be 65 years of age. At the age of 66 years, the individual became entitled to receive a State Pension (Contributory).<sup>22</sup> As from 1 January 2014, the State Pension (Transition) was removed, effectively raising the pension age to 66.<sup>23</sup> In addition, the Social Welfare and Pensions Act 2011 makes provision for raising the pension age to 67 in 2021<sup>24</sup> and 68 in 2028.<sup>25</sup> Certain

<sup>18</sup> Available at [www.socialjustice.ie/sites/default/files/file/Government%20Docs%20etc/2010-12-01%20-%20EU-IMF%20Programme%20of%20Financial%20Support%20for%20Irl%20-%20Programme%20docs.pdf](http://www.socialjustice.ie/sites/default/files/file/Government%20Docs%20etc/2010-12-01%20-%20EU-IMF%20Programme%20of%20Financial%20Support%20for%20Irl%20-%20Programme%20docs.pdf).

<sup>19</sup> Available at [www.socialjustice.ie/sites/default/files/file/Government%20Docs%20etc/2010-12-01%20-%20EU-IMF%20Programme%20of%20Financial%20Support%20for%20Irl%20-%20Programme%20docs.pdf](http://www.socialjustice.ie/sites/default/files/file/Government%20Docs%20etc/2010-12-01%20-%20EU-IMF%20Programme%20of%20Financial%20Support%20for%20Irl%20-%20Programme%20docs.pdf).

<sup>20</sup> Available at [www.socialjustice.ie/sites/default/files/file/Government%20Docs%20etc/2010-12-01%20-%20EU-IMF%20Programme%20of%20Financial%20Support%20for%20Irl%20-%20Programme%20docs.pdf](http://www.socialjustice.ie/sites/default/files/file/Government%20Docs%20etc/2010-12-01%20-%20EU-IMF%20Programme%20of%20Financial%20Support%20for%20Irl%20-%20Programme%20docs.pdf) at 12.

<sup>21</sup> It should be noted, however, that Ireland had been considering alterations to its pension age since early 2010. See Department of Social Protection (2013).

<sup>22</sup> This applies to both public and private sector workers. See Public Service Superannuation (Miscellaneous Provisions) Act 2004 (Ireland), section 10.

<sup>23</sup> Section 114(9), Social Welfare (Consolidation) Act 2005 as inserted by section 6, Social Welfare and Pensions Act 2011 (Ireland).

<sup>24</sup> Section 2(1), Social Welfare (Consolidation) Act 2005 (Ireland) as amended by section 7(1) and (2), Social Welfare and Pensions Act 2011 (Ireland).

<sup>25</sup> Section 2(1), Social Welfare (Consolidation) Act 2005 (Ireland) as amended by section 7(3) and (4), Social Welfare and Pensions Act 2011 (Ireland).

exceptions to these general pension ages exist, including pension entitlement ages for members of the permanent defence forces, who receive a pension at 50<sup>26</sup>, members of *An Garda Síochána* (the police force) who receive a pension at 55<sup>27</sup> and members of the fire brigade, who also receive a pension at 55.<sup>28</sup> Prison officers likewise receive a pension at 55 years.<sup>29</sup>

### 3. DO PROSPECTIVE PENSIONERS HAVE A LEGITIMATE EXPECTATION THAT PENSION AGE WILL NOT INCREASE?

The pension ages in both Greece and Ireland have been altered significantly in recent years. The legal question which arises is whether individuals affected by such legal alterations may have a claim that they had a legitimate expectation that they would receive a pension at a certain age and that this expectation has now been broken. This section of the paper explores the potential of such a legal claim in Greece and Ireland. It outlines the general basis of a claim, the test that the individuals will be expected to meet in each jurisdiction and the potential obstacles to such a claim in each case. It concludes that, in both Ireland and Greece, such a claim would fail as a result of certain restrictions on the application of the doctrine of legitimate expectation in this context.

#### 3.1. LEGITIMATE EXPECTATION IN GREECE AND PENSION AGE INCREASES

The principle of legitimate expectation in Greece guarantees that the legal order and existing and established legal relationships will be sustained and will not be unfavourably amended,<sup>30</sup> protecting the citizen against any arbitrary action by public authorities or the State. It is derived from the principle of the rule of law,<sup>31</sup> which

<sup>26</sup> Section 10(2)(a), Public Service Superannuation (Miscellaneous Provisions) Act 2004 (Ireland).

<sup>27</sup> Section 10(3), Public Service Superannuation (Miscellaneous Provisions) Act 2004 (Ireland).

<sup>28</sup> Section 10(5), Public Service Superannuation (Miscellaneous Provisions) Act 2004 (Ireland).

<sup>29</sup> Section 1(1)(a), Superannuation (Prison Officers) Act 1919 as substituted by Section 5(1)(a), Public Service Superannuation (Miscellaneous Provisions) Act 2004 (Ireland).

<sup>30</sup> Spiliotopoulos (2003: 25).

<sup>31</sup> The rule of law principle is a constitutional principle deriving from a number of provisions of the Greek Constitution, e.g. the principle of separation of powers (Article 26); the right to legal protection (Article 20,1); the examination of constitutionality through the national courts (Articles 87,2 and 93,4); the principle of the protection and exercise of the fundamental rights (Article 25,1) etc. Moreover, the principle of the rule of law derives also from Article 6 of the ECHR which secures the right to a fair trial and precludes any interference by the legislature on the judicial determination of the dispute. See ECtHR, *Stran Greek Refineries and Andreadis v Greece*, Application No. 13427/87, at paras 46 and 49.

guarantees that the legal provisions are governed by constancy and good governance, which is primarily achieved through the protection of the authority and the validity of the law.<sup>32</sup> The doctrine of legitimate expectation in Greek law provides that, before any amendment or recall of a specific administrative act or administrative practice, the expectation of a diligent citizen that his or her rights and legal interests, established under national law, will be retained should be taken into consideration and should not be amended without transitional periods or the provision of compensation.<sup>33</sup> Certain requirements must be met before a claim for legitimate expectation can be successful. The individual must have a representation that the *status quo* will be maintained, must rely on this representation and must have acted in good faith.

### 3.1.1. *The Representation Test*

In Greek law, an individual attempting to make out a claim for legitimate expectation must demonstrate that there has been a generalised, stable and uniform practice of the administration.<sup>34</sup> The ECtHR in *Ictigiaroglou v Greece* has confirmed that the expectation of an individual concerning the provision of welfare benefits is protected by the principle of legitimate expectation when this expectation is based on the case-law of the national courts.<sup>35</sup> Therefore, a demonstration that there is a consistent prior administrative practice and consistent prior case law of the national courts are essential to grounding a successful claim for legitimate expectation.

In applying this to the facts under consideration, it is unlikely that persons approaching pension age in Greece could argue that there has been a uniform practice that pension ages are not subject to any change. There are laws which have increased the pension age previously (e.g. Law 1902/1990, Law 2084/1992, Law 3655/2008), and there is a steady flow of national case-law, which has held that the Greek legislator is allowed to adopt amendments to the substantive prerequisites required for a pension entitlement, even if the legitimate objectives of the pension change are not mentioned in the explanatory report of the new pension legislation.<sup>36</sup>

### 3.1.2. *The Reliance Test*

Another requirement which must be met in Greek law is that of reliance on a legal provision. The Supreme Administrative Court has ruled that citizens should be legally protected only where they have demonstrated reliance on a legally favourable

<sup>32</sup> Council of State, No. of judgment 247/1980, Databank NOMOS. All judgments of the Greek Courts cited in the present article is available in the Nomos database, accessible at <http://lawdb.intrasoftnet.com/>.

<sup>33</sup> Council of State, No. of judgments 2261/1994; Council of State 2403/97; Council of State 1501/2008.

<sup>34</sup> Katrougalos (1993: 948).

<sup>35</sup> ECtHR: *Ictigiaroglou v. Greece*, Application No. 12045/06, at para 51.

<sup>36</sup> Council of State, Judgment Nos. 3451/1985, 1740/1993, 3739/99, 1867/01.

provision.<sup>37</sup> What constitutes reliance is difficult to determine but it has been argued that paying contributions for a reasonable period of time might trigger a claim for legitimate expectation.<sup>38</sup> The notion of what constitutes a 'reasonable period' has never been determined but German jurisprudence requires that a reasonable period should be capable of being translated into a pecuniary value.<sup>39</sup> However, there is no Greek case law on this point so it is very difficult to determine what this would amount to in a Greek context.

In applying this reliance principle to the situation of individuals who have had their pension age increased, it is arguable that an expectation may be legitimate where the prospective pensioners have paid contributions for a reasonable period (amounting to a certain pecuniary value) and have shown reliance that the existing legal order will not change.

### 3.1.3. *The Good Faith Test*

Another important principle in Greek law which an individual must prove in order to make a claim for legitimate expectation is that he or she has relied on a legitimate interest in 'good faith'.

In applying this particular test, it is arguable that the good faith of the prospective pensioners is related to their reliance on pension legislation that 'promises' retirement at a specific pension age. However, as discussed above, such reliance (even if in good faith) is not sufficient as the State has never claimed that the law will not change.

## 3.2. LEGITIMATE EXPECTATION IN IRELAND AND PENSION AGE INCREASES

Similar questions relating to the legitimate expectations of prospective pensioners also arise in the Irish context. As the pension provisions will be implemented progressively over the next 16 years, the question arises as to whether someone who was expecting to retire at 65 in 2014 is entitled to argue that they had a legitimate expectation that the law would remain the same and that they are therefore entitled to receive a pension or at least be considered to receive a pension at age 65 (this argument applies equally, though less forcibly, in relation to the other pension age adjustments).

An important distinction is made in this regard between a legitimate expectation which is considered to be a procedural one (the right to have fair procedures followed in a particular case) and a legitimate expectation which is considered to be a substantive one (the right to claim a substantive benefit). There is a great deal of divergence as to whether a legitimate expectation which is substantive in nature can be claimed under

<sup>37</sup> Council of State, Judgments Nos. 2261/1994; 2403/97; 1501/2008.

<sup>38</sup> Stergiou (2008: 845).

<sup>39</sup> Becker (2005:236).



Irish law. Some previous cases have held that the distinction is irrelevant<sup>40</sup> while other cases have held that only legitimate expectations based on procedural expectations can be actionable.<sup>41</sup> A more expansive approach has emerged in more recent case law.<sup>42</sup> In the case of *Curran v. Minister for Education and Science*<sup>43</sup> (hereinafter referred to as ‘*Curran*’), the applicants claimed that they held a legitimate expectation in their application under the early retirement scheme for the year 2008/2009. The applicants, initially, characterised the claim as a procedural one (a right to have their claim considered in a fair manner) rather than a substantive one (a right to obtain the benefit of the scheme). The respondents counter-argued that the nature of the applicants’ claim was not procedural but substantive in nature and therefore, as Irish law did not recognise such a claim, it could not constitute a ground for legitimate expectation. Dunne J held that the benefit which the applicants claimed was in fact a substantive rather than a procedural one but she also adopted a more expansive view of the doctrine of legitimate expectation, to the effect that both the procedural and substantive benefits can be the substance of a legitimate expectation claim.<sup>44</sup> Therefore, the current Irish law would not appear to make any distinction between procedural and substantial claims for legitimate expectation.

Whether these claims will be successful, however, will depend upon whether the claimant meets the test for legitimate expectation as set out under Irish law. This section of the paper examines the test for legitimate expectation under Irish law and analyses whether a person making a claim in relation to the alterations in pension age or the manner in which it was imposed would have a successful claim under the current legal rules relating to legitimate expectation in Ireland.

Legitimate expectation<sup>45</sup> as a stand-alone legal claim in Ireland is a ‘relatively newly established cause of action’<sup>46</sup> which had previously been linked to the doctrine of estoppel.<sup>47</sup> It was first asserted as a stand-alone legal claim in the Supreme Court case

<sup>40</sup> See *Glencar Exploration PLC v. Mayo County Council (No. 2)* [2002] 1 I.R. 84 at p. 131 (per Keane C.J.); *Abrahamson v. The Law Society of Ireland* [1996] 1 I.R. 403 (per McCracken J) and *Duggan v. An Taoiseach* [1989] I.L.R.M. 710 (per Hamilton P).

<sup>41</sup> See *Tara Prospecting Ltd. v. Minister for Energy* [1993] I.L.R.M. 771 at 788 (per Costello J).

<sup>42</sup> See for example the cases of *Glencar Exploration PLC v. Mayo County Council (No. 2)* [2002] 1 I.R. 84, *Dunleavy v. Dun Laoghaire County Council* [2005] IEHC 381, *Power v. Minister for Social and Family Affairs* [2007] 1 I.R. 543; *Lett and Co. Ltd. v. Wexford Borough Corporation* [2007] IEHC 195.

<sup>43</sup> *Curran v. Minister for Education and Science* (2009) 4 I.R. 300.

<sup>44</sup> *Curran v. Minister for Education and Science* (2009) 4 I.R. 300 at 316 (per Dunne J).

<sup>45</sup> For more information on the doctrine of legitimate expectation in Ireland see Hogan and Morgan (2010); Delaney, H (1993: 192); Brady (1996: 133); Delaney (1997: 217); McDermott and Buckley (2007: 29); and O’Connor (1988: 147).

<sup>46</sup> *Keogh v. Criminal Assets Bureau* (2004) 2 I.R. at 174 (per Keane CJ). See also the denial of the existence of such a principle in the case of *Goldrick v. Dublin Corporation* (1987) 6 JISLL 156.

<sup>47</sup> See the comments in *Webb v. Ireland* (1988) IR 353 at 384 (per Finlay J) and in *Garda Representative Association v. Ireland* (1989) IR 193 (per Murphy J). There was also an unsuccessful reference to legitimate expectation in the earlier case of *Smith v. Ireland and Others* (1983) ILRM 300.

of *Webb v. Ireland*<sup>48</sup> (hereinafter referred to as “*Webb*”) and has been since separated from the closely related doctrine of estoppel.<sup>49</sup> In general, the courts have held that a claimant has to meet three positive criteria before a claim for legitimate expectation can be considered. There are also a number of limitations on the doctrine of legitimate expectation which may frustrate the operation of the doctrine in certain cases.

The three positive criteria that must exist in order to establish a claim of legitimate expectation are:

1. *The Representation Test*: ‘the public authority must have made a statement or adopted a position amounting to a promise or representation, express or implied, as to how it will act in respect of an identifiable area of its activity’<sup>50</sup>
2. *The Identifiable Individual or Group Reliance Test*: ‘the representation must be addressed or conveyed, either directly or indirectly, to an identifiable person or group of persons, affected actually or potentially, in such a way that it forms part of a transaction definitively entered into or a relationship between that person and group and the public authority or that the person or group has acted on the faith of the representation’<sup>51</sup>
3. *The No-Resiling Test*: ‘it must be such as to create an expectation reasonably entertained by the person or group that the public authority will abide by the representation to the extent that it would be unjust to permit the public authority to resile from it’<sup>52</sup> However, there are exceptions to this aspect of the test. Three examples of such exceptions include the legitimacy of the expectation<sup>53</sup>, the potential for fettering the discretion of a public body and overriding considerations in the public interest.<sup>54</sup>

Therefore, in order for an individual to make a claim that he or she had a legitimate expectation that he or she would receive (or at least could legitimately apply to receive) a pension at the age of 65 in 2014, the person must show that some representation has been made, that this representation was made to a certain individual or group of individuals and that it would be unfair for the State to resile from this representation in the circumstances. In considering the latter aspect of this test, the individual would also have to show that the representation was legitimate, that the discretion of the legislature to change pension policy was not being fettered by this expectation

<sup>48</sup> *Webb v. Ireland* (1988) I.R. 353. There was also an unsuccessful reference to legitimate expectation in the earlier case of *Smith v. Ireland and Others* (1983) ILRM 300.

<sup>49</sup> See for example the case of *Fakih v. Minister for Justice* [1993] 2 I.R. 406 at 423 (*per* O’Hanlon J.).

<sup>50</sup> *Glencar Exploration PLC v. Mayo County Council* (2002) 1 IR 84 at p. 162 (*per* Fennelly J.).

<sup>51</sup> *Glencar Exploration PLC v. Mayo County Council* (2002) 1 IR 84 at p. 162 (*per* Fennelly J.).

<sup>52</sup> *Glencar Exploration PLC v. Mayo County Council* (2002) 1 IR 84 at pp. 162–163 (*per* Fennelly J.).

<sup>53</sup> *Lett and Co. Ltd. v. Wexford Borough Council* (2007) IEHC 195 at paragraph 4.7 (*per* Clark J.).

<sup>54</sup> *Curran v. Minister for Education and Science* (2009) 4 IR 300 at pp. 317–318 (*per* Dunne J.).

and that there were no overriding considerations in the public interest which would frustrate the legitimate expectation of the individual in such a case.

### 3.2.1. *The Representation Test*

The individual claimant must show that some form of promise or representation was made to them. The most important question here is what constitutes a representation for the purposes of the test. There have been a number of cases in the Irish context which, while not dealing exactly with this question, give some guidance as to what constitutes a representation in these cases. Clearly an express statement in writing will amount to a representation.<sup>55</sup> However, many cases involve more complicated forms of representation. So a verbal assurance was sufficient in the case of *Webb*,<sup>56</sup> and a statement made by a Minister during parliamentary debates was found sufficient to constitute a representation in the case of *Garda Representative Association v. Ireland, the Attorney General and the Minister for Justice*<sup>57</sup> (hereinafter referred to as '*Garda Representative Association*'), and in the case of *Galvin v. Chief Appeals Officer*<sup>58</sup> (hereinafter referred to as '*Galvin*'). Costello P. in the High Court held that a representation existed in a case where the claimant had been informed verbally and by letter that he did not need to purchase additional contributions in order to qualify for a pension.<sup>59</sup> However, in the case of *Kavanagh v. Government of Ireland*<sup>60</sup> (hereinafter referred to as '*Kavanagh*'), the representation relied upon was a statement made by the Attorney General to a UN Committee. In this case, the court held that as the law in Ireland was clearly set out in statute, no representation or utterance could alter the effect of the law as enacted.

In the case of *Curran v. Minister for Education and Science*<sup>61</sup> (hereinafter referred to as '*Curran*'), Dunne J. considered the situation of eighteen post-primary school teachers who wished to apply for early retirement, pursuant to a particular scheme of the Department of Education and Skills. The Department of Education and Skills in Circular 0102/2007 informed qualifying teachers that the scheme would be operating in the year in which the claimants made their application (2008/2009) but the scheme was then withdrawn due to difficulties with the public finances. The claimants argued that this Circular amounted to an express representation which the claimants had

<sup>55</sup> See *Egan v. Minister for Defence* High Court November 24 (1988); *Duggan v. An Taoiseach* (1989) ILRM 710; *Gheim v. Minister for Justice*, The Irish Times, 2 September (1989).

<sup>56</sup> *Webb* at 385 (*per* Finlay CJ).

<sup>57</sup> *Garda Representative Association v. Ireland, the Attorney General and the Minister for Justice* (1989) 1 IR 193.

<sup>58</sup> *Galvin v. Chief Appeals Officer* (1997) 3 I.R. 240.

<sup>59</sup> *Galvin v. Chief Appeals Officer* (1997) 3 I.R. 240 at p. 254 (*per* Costello P.).

<sup>60</sup> *Kavanagh v. Government of Ireland* (1996) 1 IR 321.

<sup>61</sup> *Curran v. Minister for Education and Science* (2009) 4 I.R. 300.

relied on.<sup>62</sup> Dunne J held that this did amount to a representation or promise, so as to satisfy the first limb of the test.<sup>63</sup> However, in the most recent case on legitimate expectation in Ireland, *McCarthy v. Minister for Education and Skills*<sup>64</sup> (hereinafter referred to as ‘*McCarthy*’), the applicants alleged that an alteration of the criteria for the award of student support grants payable under the Student Support Act 2011 amounted to a breach of legitimate expectation. In this case the applicants were not alleging that any particular representation had been made to the effect that the criteria for the grant of the payment would not be altered. However, it would appear that Hedigan J considered that the rules, as stated in the grant scheme, were potentially not sufficient to constitute a representation in this context.

In the case of an individual who wishes to challenge the change in pension age, it could be argued that the law, as stated in section 114 of the Social Welfare Consolidation Act 2005, to the effect that ‘a person who has attained the age of 65 years shall be entitled to retirement pension for any period of retirement where he or she satisfies the contribution conditions in section 115’,<sup>65</sup> amounts to a specific representation that a pension is available at the age of 65 years, once certain conditions are met. Therefore, similar to the applicants in the case of *McCarthy*, it may be that the *statement* in the law constitutes a clear representation which could be relied on by certain individuals or groups of individuals.

### 3.2.2. *The Identifiable Individual or Group Reliance Test*

Secondly, it must be shown that the representation is made to an identifiable individual, or group of individuals, who rely on the representation. There are therefore two separate aspects to this limb of the test. Firstly, it must be shown that the representation is made to an identifiable person or group of persons and secondly, it must be shown that the individual or group of individuals relied in some way on this representation.

In relation to the first aspect of the test and the establishment of an identifiable person or group of persons, some useful examples of what constitutes an identifiable person or group of persons can be gleaned from the case of *Curran*, in which the claimants (post-primary school teachers) argued that they constituted a limited class of persons to whom an express representation had been made. The respondents, however, argued that the representation was made to all teachers, who are some 60,000 in number, and could not be said to have been made to an identifiable group, as this number was much too large.<sup>66</sup> Dunne J agreed that the Circular had been sent to all permanent teachers, which was a very large group, but given that the Supreme Court

<sup>62</sup> *Curran v. Minister for Education and Science* (2009) 4 I.R. 300 at 308 (per Dunne J).

<sup>63</sup> *Curran v. Minister for Education and Science* (2009) 4 I.R. 300 at 311 (per Dunne J).

<sup>64</sup> *McCarthy v. Minister for Education and Skills* (2012) IEHC 200.

<sup>65</sup> Section 114, Social Welfare and Consolidation Act 2005 (as amended).

<sup>66</sup> *Curran v. Minister for Education and Science* (2009) 4 I.R. 300 at 309 (per Dunne J).

in *Keogh v. Criminal Assets Bureau*<sup>67</sup> (hereinafter referred to as ‘Keogh’) held that a statement made by the Revenue Commissioners in the Taxpayers’ Charter of Rights gave rise to a binding statement that an individual taxpayer could rely on, despite the fact that it was made to all taxpayers (a very large group of individuals), she could not accept that the size of the group was too large to be an identifiable one. In a similar vein, the identifiable group in *Glenkerrin Homes v. Dun Laoghaire Rathdown County Council*<sup>68</sup> (hereinafter referred to as ‘Glenkerrin’) was also very large, as it consisted of all purchasers of property, and yet the court had no difficulty in finding the group an identifiable one. Dunne J therefore held in the case of *Curran* that the size of the group alone could not operate so as to frustrate the application of the doctrine of legitimate expectation. The key consideration is whether the group is identifiable and on the facts of the *Curran* case this consideration was satisfied.

The second aspect of this test is whether the identifiable group or individual relied on the representation made.<sup>69</sup> This has become an established aspect of the case law, with many cases failing to make out a case of legitimate expectation on the grounds that they did not rely on the representation made to them.<sup>70</sup> However, this reliance does not have to be detrimental. In the case of *Daly v. Minister for the Marine*<sup>71</sup> (hereinafter referred to as ‘Daly’), it was held that ‘an expectation may be legitimate and cognisable by the courts even in the absence of the sort of action to the claimant’s detriment’.<sup>72</sup> However, there must be ‘some context relevant to fairness in the exercise of legal or administrative powers. Those who come within the ambit of an administrative or regulatory regime may be able to establish that it would be unfair, discriminatory or unjust to permit the body exercising a power to change a policy or a set of existing rules, or depart from an undertaking or promise without taking account of the legitimate expectations created by them. However, the very notion of fairness has within it the idea that there is an existing relationship which it would be unfair to alter’.<sup>73</sup> The impact of this statement is perhaps best illustrated by the decision of Dunne J in the case of *Curran*, where she held that the teachers had relied on the Circular issued by the Department of Education and that even though the Department was not aware of the claims of all of these teachers, the Department was aware that such teachers could avail themselves of the scheme if they satisfied certain criteria. The fact that those individual teachers’ thoughts were not known to the Department could not be a material factor in determining reliance.

<sup>67</sup> *Keogh v. Criminal Assets Bureau* [2004] 2 I.R. 159.

<sup>68</sup> *Glenkerrin Homes v. Dun Laoghaire Rathdown County Council* [2007] IEHC 298.

<sup>69</sup> *Cromane Seafoods Limited v. Minister for Agriculture and Others* [2013] IEHC 338.

<sup>70</sup> *Garda Representative Association v. Ireland* (1989) IR 193, *Devitt v. Minister for Education* (1989) ILRM 639; *Cosgrave v. Legal Aid Board* High Court, 14 October (1990).

<sup>71</sup> *Daly v. Minister for the Marine* (2001) 3 IR 513.

<sup>72</sup> *Daly v. Minister for the Marine* (2001) 3 IR 513 at 528 (per Fennelly J).

<sup>73</sup> *Daly v. Minister for the Marine* (2001) 3 IR 513 at 528 (per Fennelly J).

In applying this law to the situation of a person expecting to retire at 65 in 2014, two specific questions must be addressed. First, is there an identifiable individual or group and secondly, did this individual or group rely on the representation made? In relation to the first question in this test, the particular group concerned is the group of persons seeking to retire and apply for a pension at the age of 65 in 2014. This is indeed potentially a very large group of persons, but as Dunne J noted in the case of *Curran*, this will not defeat the doctrine of legitimate expectation as long as this group of individuals is identifiable. This group is potentially identifiable as they were all born in 1949 and satisfy the conditions for applying for a pension. In relation to the second aspect of the test, it could be argued that persons born in 1949 relied on the law as stated and the criteria set out in that law and organised their working lives and savings accordingly and this did not necessarily have to lead to detriment. Therefore, it is possible that this aspect of the test could also be fulfilled.

### 3.2.3. *The No-Resiling Test*

Thirdly, it must be proved that the representation is such that it would be wrong for the public authority to resile from it. This involves a consideration of whether there is any legitimate reason that a public body may have for resiling from the representation made. Certain circumstances in which the courts have held that a public body is entitled to resile from a representation made will now be discussed.

#### 3.2.3.1. The expectation must be legitimate

It has been held that only 'legitimate' expectations can form the basis of a claim for legitimate expectation and that a public body is entitled to resile from any representation made if the expectation claimed is not legitimate. What must therefore be determined in each individual case is whether the claim is legitimate. What constitutes legitimacy has been determined by the courts in Ireland in a number of cases. Most interesting is the case of *Wiley v. Revenue Commissioners*<sup>74</sup> (hereinafter referred to as '*Wiley*') where the applicant argued that, as he had successfully gained a refund under a particular scheme under the Finance Act 1968 on two occasions (for which he had not been technically eligible), he had a legitimate expectation that he would be successful again. Blaney J held that, in a case where a refund was granted to eligible persons, such persons could reasonably expect that refund to continue. If that scheme were subsequently altered or ceased entirely without notice, so that persons formerly eligible lost their eligibility, this would amount to a breach of legitimate expectations.<sup>75</sup> However, this was not the case here as the applicant had never been

<sup>74</sup> *Wiley v. Revenue Commissioners* (1989) IR 350.

<sup>75</sup> *Wiley v. Revenue Commissioners* (1989) IR 350 at 358 (per Blaney J). See the case of *Cannon v. Minister for Marine* (1991) ILRM 261.

entitled under the scheme in the first place.<sup>76</sup> There seems to be evidence in the case law that the courts will not allow individuals or groups to make claims for which they are not entitled.

This particular aspect of the test will produce some problems for individuals or a group of individuals seeking to argue that they are entitled to a pension at the age of 65 in 2014. There are two ways the court could interpret this in the context of a legislative representation. Firstly, the court could determine that, as the law has changed, a person turning 65 in 2014 is not eligible for a pension under the current law as they do not meet the essential criteria for receiving a pension (i.e. that they are 66 years) and, as such, their claim for legitimate expectation is not legitimate. This would appear to be in line with the interpretation of the courts in social welfare cases. An alternative view might be that as the group of individuals had always been eligible to retire at 65<sup>77</sup> (according to the old law), the claim is therefore legitimate and that this change of law without notice would amount to a breach of legitimate expectations. If this interpretation of the law is chosen, then the major issue for consideration would be whether the change in policy was made without notice (as required by *Blaney J* in the case of *Wiley*). The case would then turn on the notice that is required to change a law that is affecting a group or specific individual financially. There is an argument that no notice would be required in such circumstances. The legislature is constantly changing tax and social welfare laws. However, the legislature normally provides some notice that changes are going to occur so as to give individuals, or groups of individuals, sufficient time to alter their financial circumstances. Whether they are required by law to do this, and whether a judge would be willing to determine that they are so required, is doubtful. Therefore, it appears that this stage of the test might prove fatal to any claim for legitimate expectation in these circumstances.

### 3.2.3.2. Fettering the Discretion of a Public Body Test

Another hurdle for individuals, or groups of individuals, in such a case is the argument that a claim for legitimate expectation in such circumstances would fetter the discretion of the legislature to such an extent that a legitimate expectation claim cannot be allowed. It has been held that the doctrine cannot operate so as to limit the scope of a statutory power or to prevent the enactment of legislation.<sup>78</sup> A recent interesting example of this is the case of *Glenkerrin Homes v. Dun Laoighaire Rathdown County Council*<sup>79</sup> (hereinafter referred to as '*Glenkerrin*') in which Clark J held that

<sup>76</sup> See also the case of *Atlantic Marine Supplies Limited and Sean Rogers v. Minister for Transport, Ireland and the Attorney General* (2011) 2 ILRM 12 where the court held (at para 7.18) that there was no evidence that this was a case of someone getting something to which they were not entitled.

<sup>77</sup> Provided that they meet all the other conditions for entitlement to a pension too.

<sup>78</sup> See for example the cases of *Devitt v. Minister for Education* (1989) ILRM 639 and *Pesca Valentia Ltd. v. Minister for Fisheries* High Court June 6, (1989).

<sup>79</sup> *Glenkerrin Homes v. Dun Laoighaire Rathdown County Council* (2011) 1 IR 417.



the executive enjoys a constitutional entitlement to change policy<sup>80</sup> and that bodies exercising statutory roles have an entitlement to alter policy, subject to the requirement that such an alteration is consistent with their statutory role as defined.<sup>81</sup> He held that it is clear that ‘a legitimate expectation cannot arise to the effect that a policy will not be changed’.<sup>82</sup> The case of *Hempenstall v. Minister for the Environment*<sup>83</sup> (hereinafter referred to as ‘*Hempenstall*’) is illustrative of this approach. In that case, the Minister for the Environment brought in a new policy in respect of taxi licences which would have the effect of reducing the value of existing licences significantly. The court held that there could be no claim for legitimate expectation in such a case, as there was an overriding entitlement on behalf of the Minister to alter existing policy.

Again the application of this test would appear to present an obstacle to the case of the individual or group of individuals making a claim in relation to their pension entitlement at the age of 65. The main obstacle is that many of the decisions protect the right of the legislature to enact legislation and presumably to alter such legislation. If this right is absolute, then a claim for legitimate expectation based on a change of legislation will be unsuccessful.

### 3.2.3.3. Public Interest Considerations Test

Even if the individual, or group of individuals, can overcome the significant hurdles presented above, the Irish courts have consistently held that certain public interests can override a legitimate expectation. The recent financial crisis has brought this limitation on legitimate expectation to the fore. It was held in the case of *Curran* that the authorities in Ireland, and in the United Kingdom, were clear that the existence of an overriding public interest will always override a legitimate expectation.<sup>84</sup> Dunne J referred to the ‘bleak sketch of the state of the public finances at the time the decision was taken’ and the fact that the ‘very budget in which the announcement to suspend this scheme was announced was brought forward in response to the worsening economic circumstances’.<sup>85</sup> She was satisfied that declining economic circumstances were such that the overriding public interest in taking the decision to suspend the scheme must outweigh any legitimate expectation the applicants had to pursue their applications under the scheme.<sup>86</sup> This was followed in the case of *McCarthy*

<sup>80</sup> *Glenkerrin Homes v. Dun Laoghaire Rathdown County Council* (2011) 1 IR 417 at p. 428 (per Clark J).

<sup>81</sup> *Glenkerrin Homes v. Dun Laoghaire Rathdown County Council* (2011) 1 IR 417 at p. 428 (per Clark J).

<sup>82</sup> *Glenkerrin Homes v. Dun Laoghaire Rathdown County Council* (2011) 1 IR 417 at p. 428 (per Clark J).

<sup>83</sup> *Hempenstall v. Minister for the Environment* [1994] 2 I.R. 20.

<sup>84</sup> *Curran v. Minister for Education and Science* (2009) 4 I.R. 300 at 317 (per Dunne J). Dunne J referred to the cases of *Glencar Exploration p.l.c. v. Mayo County Council* (No. 2) [2002] 1 I.R. 84; *Power v. Minister for Social and Family Affairs* [2006] IEHC 170; *R. (Nadarajah) v. Secretary of State for the Home Department* [2005] All E.R. 283; and *R. v. North and East Devon Health Authority, ex parte Coughlan* [2001] Q.B. 213 in support of this contention.

<sup>85</sup> *Curran v. Minister for Education and Science* (2009) 4 I.R. 300 at p. 317 (per Dunne J).

<sup>86</sup> *Curran v. Minister for Education and Science* (2009) 4 I.R. 300 at p. 317 (per Dunne J).

where it was held that even an expectation that is legitimately held may be qualified by considerations of the public interest. With reference to the ‘perilous state of the public finances’ and the ‘unprecedented economic emergency’ it was held that given the obvious requirement for reduction in public expenditure, there was a clear public policy basis for the respondent’s actions.<sup>87</sup>

In this case, it is clear that the public interest in protecting and supporting the public finances at a time of crisis might outweigh any legitimate expectation that might be claimed by individuals. The most likely decision of a court would be that the financial crisis necessitated these measures and that, therefore, there could be no claim to a pension at the age of 65 years. Whether this would also extend to the provision of sufficient transition or notice periods is unclear, but in *Curran* and in *McCarthy*, the court found that the public interest overrode this consideration also. Therefore, the current state of the public finances would appear to be an insurmountable hurdle for individuals or groups of individuals claiming legitimate expectation in Ireland.

#### 4. DO PROSPECTIVE PENSIONERS HAVE A LEGITIMATE EXPECTATION THAT TRANSITIONAL MEASURES WILL BE INTRODUCED?

An alternative question, which might arise if it is to be accepted that there is no legitimate expectation that pension legislation will not change, is whether there can be a legitimate expectation that pension legislation will not change without sufficient transitional measures being put in place. There has been some support for this principle in other jurisdictions.<sup>88</sup> Again similar questions arise to those dealt with in relation to the question above and the legal arguments in support of such a claim are weak. However, it appears that there may be growing acceptance of the introduction of such a principle in Ireland.

##### 4.1. GREEK LAW ON TRANSITIONAL PERIODS

In the cases under consideration, the legislature amended the legal situation of the prospective pensioners without the introduction of transitional periods during which they could alter their finances so as to prepare for the increase in pension age. In order to demonstrate that this amounted to a breach of their legitimate expectations that transitional measures would be introduced, the prospective pensioners must again

<sup>87</sup> *McCarthy v. Minister for Education and Skills* (2012) IEHC 200 at para 6.6 (*per* Hedigan J).

<sup>88</sup> See the Constitutional Court of Latvia, Case No. 2009–43–01, Judgment of 21 December 2009 at para 32. The Court ruled that the pension reductions did not comply with the principle of legitimate expectation on the grounds that the legislator did not provide for the introduction of an adequate transitional period which would have ensured a more reasonable balance between the confidence of the prospective pensioners and the public interest.

demonstrate that they relied in good faith on established administrative practice and case law. It could be argued that the prospective pensioners relied in good faith on such practice, since it is arguable that the prospective pensioners could not have predicted the introduction of new pension reforms within the period of two years. The retirement age was raised rather swiftly to the age of 65 in 2010 by Law No. 3863/2010, while after a further two years the retirement age was increased from 65 to 67 by Law No. 4093/2012 without the introduction of any transitional periods. Moreover, in the past the introduction of transitional periods was a legislative practice in case of pension reforms.<sup>89</sup>

However, there is consistent previous case-law declaring that the non-introduction of a transitional period is lawful and that the national legislator is not obliged to introduce transitional periods for the protection of pension rights.<sup>90</sup> Therefore, it is more difficult from the Greek perspective to recognise as legitimate the expectations of the prospective pensioners, on the ground that there is no specific case law which would appear to insist that some notice or transitional periods may be required in certain cases. Only the minority of the Council of State has held that the legislator is obliged to introduce transitional periods, so that individuals that have acted in good faith have the opportunity to adjust to their new economic situation.<sup>91</sup> This was also supported by the Court of Audit. The latter expressed the view, in its advisory opinion for Pension Bill No. 4093/2012,<sup>92</sup> that the absence of transitional periods contradicts the principle of legitimate expectation, without, however going into further legal arguments.<sup>93</sup>

While the current expectation of prospective pensioners that transitional arrangements should have been introduced is unlikely to be accepted at the Greek court level, there is growing support for such an argument among academics. The Greek academic community has put forward interesting arguments in support of the introduction of transitional periods in such cases. According to the Greek literature, the introduction of transitional periods is essential so that the legitimate expectations of the future and current pensioners are not altered in a sudden and unexpected way.<sup>94</sup> According to Lazaratos, the judicial powers should examine the constitutionality of true retroactivity by balancing the ratio of the retroactive law and the principle of protection of legitimate expectation.<sup>95</sup> Angelopoulou supports the contention that the more unfavourable the new pension regulations are, the more adequate the transitional

<sup>89</sup> Angelopoulou (2009: 180).

<sup>90</sup> E.g. Council of State, Judgment No. 707/06.

<sup>91</sup> Council of State, Judgment No. 2346/1978.

<sup>92</sup> According to Article 73 par. 2 and Article 98 of the Gr. Const., the Court of Audit has the jurisdiction to give advisory opinions concerning statutes on pensions, before the pension bills is submitted by the competent Minister and the Minister of Finance to the Parliament.

<sup>93</sup> Opinion of the Court of Audit of 30 and 31 October 2012.

<sup>94</sup> Chrysogonos (2006: 565).

<sup>95</sup> Lazaratos (2003: 139).

periods should be, so that the principle of legitimate expectation is not excessively affected.<sup>96</sup> However, prospective pensioners do not have a legitimate expectation that transitional measures will be introduced, on the grounds that their expectations are not legitimate, since they cannot demonstrate consistent prior case-law obliging the national legislator to introduce transitional periods.

#### 4.2. IRISH LAW ON TRANSITIONAL PERIODS

In order to claim that there was a legitimate expectation that some transitional measures would be introduced, the individuals involved would again have to satisfy the representation, reliance and non-resiling tests (as set out above). While there would appear to be a significant amount of case law which would potentially rule out any positive outcome in such cases, there have been statements made in a number of cases that indicate a growing judicial preference for adequate notice or transitional periods.

In the case of *Glenkerrin*, Clark J held that, while the existence of a longstanding practice does not give rise to any expectation that the practice will not change, where third parties reasonably 'arrange their affairs by reference to such a practice it seems to me that such third parties are entitled to rely upon an expectation that the practice will not be changed without reasonable notice being given'.<sup>97</sup> The level of notice that would be required in such circumstances would be that which would 'reasonably allow those who have conducted their affairs in accordance with the practice to consider and implement an alternative means for dealing with the issues arising'.<sup>98</sup> A similar argument also arose in the case of *Curran* where the applicant teachers argued that, while there was a right to abolish or vary a scheme, the manner in which the scheme had been withdrawn was unfair. A decision had been taken summarily to withdraw the scheme, in the absence of any provision for transitional arrangements or notice to enable the applicants to re-organise their affairs. However, in the case of *Curran*, Dunne J could not see any reason why a reasonable notice period should have been introduced. She held that there 'may be cases where the nature of a change of policy is such that it would be appropriate to have a reasonable period of notice or transitional arrangements in place for those affected by a change of policy'<sup>99</sup> but that this was not one of them. This would appear to be particularly pertinent in cases where the retrospective changes affect the eligibility of certain parties. In the case of *Wiley*, Blaney J held that where a revenue scheme was subsequently altered or ceased

<sup>96</sup> Angelopoulou (2010), The new retirement age provisions of Law 3863/2010 – The protection of established rights and legitimate expectations under the Constitution and Article 1 of the First Protocol ECHR (in Greek), *Review of Social Security Law* (Greek Journal), 904–922 at 911.

<sup>97</sup> *Glenkerrin Homes v. Dun Laoghaire Rathdown County Council* (2011) 1 IR 417 at p. 428 (per Clark J).

<sup>98</sup> *Glenkerrin Homes v. Dun Laoghaire Rathdown County Council* (2011) 1 IR 417 at p. 428 (per Clark J).

<sup>99</sup> *Curran v. Minister for Education and Science* (2009) 4 I.R. 300 at p. 316 (per Dunne J).

entirely without notice, so that persons formerly eligible lost their eligibility, this would amount to a breach of legitimate expectations.<sup>100</sup>

While there would appear to be some judicial statements that support such transitional periods, it should not be overlooked that none of these cases involve amendments to laws but only amendments to administrative schemes. Therefore, if it is to be argued that an amendment to the law should not be made without transitional periods, the traditional restrictions on legitimate expectation, such as non-fettering of the discretion of the legislature or the public interest test, may be utilised to defeat such a claim. However, the fact remains that there is some support for the idea that, where rules are changed and have an impact on individuals' rights retrospectively, the legislature may be legitimately expected to entertain the idea of the introduction of transitional periods or reasonable notice.

## 5. ARE LEGITIMATE EXPECTATIONS PROTECTED BY ARTICLE 1, PROTOCOL 1 OF THE ECHR?

Another interesting angle to consider, which has already been considered by the Greek Supreme Administrative Court, the Council of State, is that there may be a potential claim under Article 1, Protocol 1. While both the Greek and Irish Constitutions protect the right to property,<sup>101</sup> there is no clear authority in either jurisdiction which clarifies whether the protection of social security benefits falls under the constitutional right to property. Therefore, the consideration of this claim will be limited to Article 1, Protocol 1 of the ECHR, to which both Greece and Ireland are bound.

The concept of a possession within the ECHR is an autonomous one and is not dependent on classifications in national law.<sup>102</sup> However, the fact that the Greek courts consider that legitimate expectations fall within the right to property under the Greek Constitution does not mean that this will be the case under the ECHR. The definition of possession is extremely broad and is not limited to existing possessions but can also apply to claims 'in respect of which the applicant can argue that he has at least a reasonable and "legitimate expectation" of obtaining effective enjoyment of a property right'.<sup>103</sup>

In *Kopecky v Slovenia*<sup>104</sup> the ECtHR held that there were different types of legitimate expectations and some of these might give rise to a claim under Article 1,

<sup>100</sup> *Wiley v. Revenue Commissioners* (1989) IR 350 at 358 (*per* Blaney J). See the case of *Cannon v. Minister for Marine* (1991) ILRM 261.

<sup>101</sup> Article 17 of the Greek Constitution and Article 40.3.2 and Article 43 of the Irish Constitution.

<sup>102</sup> *Iatridis v Greece* (Application No. 31107/96) at para 54; *Beyeler v Italy* (Application No. 33202/96) at para 100; *Broniowski v Poland* (Application No. 31443/96) at 129 and *Anheuser-Busch Inc. v Portugal* (Application No. 73049/01) at para 63.

<sup>103</sup> *Prince Hans-Adam II of Liechtenstein v Germany* (Application No. 42527/98) at para 83 and *Öneryildiz v Turkey* (Application No. 48939/99) at para 124.

<sup>104</sup> *Kopecky v Slovenia* (Application No. 44912/98).

Protocol 1. First, legitimate expectations based on ‘a reasonably justified reliance on a legal act which has a sound legal basis and which bears on property rights’<sup>105</sup> could found a claim under Article 1, Protocol 1. Secondly, an expectation of a claim for damages arising under domestic law would also be covered by the ECHR.<sup>106</sup> Thirdly, the applicant must have a ‘currently enforceable claim that was sufficiently established’.<sup>107</sup> In order to meet this requirement, the applicant must have a legitimate expectation which is more than a mere hope and which is based on a ‘legal provision or a legal act such as a judicial decision’.<sup>108</sup>

Applying this then to the facts presented, it is unlikely that a prospective pensioner would be entitled to claim protection on the basis of this legitimate expectation under Article 1, Protocol 1 of the ECHR. The Council of State has reaffirmed this in a recent decision where it held that a legitimate expectation to receive an old-age pension benefit under a previously more favourable pension law is not a possession under Article 1, Protocol 1 of the ECHR.<sup>109</sup> In this case, an employee of the National Bank of Greece and a mother of minor children, who would have been entitled to a pension under the previous pension regime, was held not to have a legitimate expectation that she could retire after completing the contributory period of 15 years required under the old legislation. Instead she would not be able to retire until she had met the requirements of the new legislation i.e. on reaching the age of 42 years (Law 1976/1991). The Supreme Administrative Court held that the rise in the retirement age did not abolish any pension right, but only postponed the exercise of the pension right until the individual reached the new retirement age.<sup>110</sup> Therefore, prospective pensioners would not be able to found a claim under Article 1, Protocol 1 due to the fact that they would not be able to establish a legal basis for a claim for legitimate expectation in national law. Equally, it has been asserted, on a slightly different legal basis, that the increase in the retirement age does not interfere with the right to property.<sup>111</sup> This is because pension age is not linked to the property of the prospective pensioners (value of pension expectation) but is more accurately said to be linked to the aim of the old-age pension scheme which is to determine the age after which means cannot be acquired through work.

Another interesting angle to consider is the line of case law of the ECtHR, which, while not directly referring to legitimate expectations, does refer to the right

<sup>105</sup> *Pine Valley Developments Ltd. and Others v Ireland* (judgment of 29 November 1991, Series A no. 22) at para 47. See also *Stretch v United Kingdom* (Application No. 44277/98) at para 35.

<sup>106</sup> *Pressos Compania Naviera SA and Others v Belgium* (judgment of the 20 November 1995, Series A no. 332) at para 31.

<sup>107</sup> *Ibid* at para 49.

<sup>108</sup> *Ibid* at para 49. See also *Gratzinger and Gratzingerova v Czech Republic* (Application No. 39794/98) at para 73.

<sup>109</sup> Council of State No. of judgments 718/2006, 3267/2002, 2118/2005. For more cases see Angelopoulou (2009).

<sup>110</sup> Council of State, judgment No. 718/2006, point 8.

<sup>111</sup> Becker (2005: 236).

to a pension and other welfare payments in circumstances analogous to legitimate expectation. The ECtHR has held that where a state has in force 'legislation providing for the payment as of right of a welfare benefit or pension – whether conditional or not on the prior payment of contributions – that legislation must be regarded as generating a proprietary interest falling within the ambit of Article 1 of Protocol No. 1 for persons satisfying its requirements'.<sup>112</sup> The reduction in such an amount, or the elimination of such an amount, may constitute an interference with the peaceful enjoyment of possessions.<sup>113</sup> However, the ECtHR has also held that where a person does not satisfy, or ceases to satisfy, the 'legal conditions laid down in domestic law for the grant of any particular form of benefits or pension, there is no interference with the rights under Article 1 of Protocol No. 1'.<sup>114</sup> Finally, the ECtHR has reiterated that just because a person has entered into and formed part of a State social security system 'does not necessarily mean that that system cannot be changed either as to the conditions of eligibility of payment or as to the *quantum* of the benefit or pension'.<sup>115</sup> This would appear to remove any suggestion of a legitimate expectation to a pension at a particular time.

However, the decision in *Asmundsson* would appear to conflict with these authorities. In this case, the ECtHR held that the applicant who was deprived of a disability benefit due to the manner in which the eligibility entitlements to the scheme were redesigned and held that the excessive and disproportionate burden on the applicant in this case clearly distinguishes it from the more 'reasonable and commensurate' reductions in other cases.<sup>116</sup> While the *Asmundsson* case could be likened to the case of the prospective pensioners in Greece and in Ireland in that there is a total deprivation of entitlement in those cases, rather than a mere reduction, the fact that the applicant in the *Asmundsson* case was made to bear an 'excessive and disproportionate burden'<sup>117</sup> coupled with the fact that the prospective pensioners will experience a delayed, rather than a total deprivation of their pension rights, suggests that the decision in *Demanjac* would probably be the relevant authority which would be followed by the ECtHR. This position is supported by the decision of the ECtHR

<sup>112</sup> *Damjanac v Croatia* (Application No. 52934/10) at para 85. See also *Domalewski v Poland* (Application No. 34610/97) and *Jankovic v Croatia* (Application No. 43440/98); *Supreme Administrative Court and other v. UK*, Decision of 6 July 2005 (Application No. 65731/01) at para 54; *Gaygüsüz v. Austria*, (Application No. 17371/90) at para 41; *Antonakopoulos and others v. Greece*, (Application No. 37098/97); *Apostolakis v. Greece*, (Application No. 39574/07); *Moskal v. Poland*, (Application No. 10373/05) at para 45; *Kohniakina v. Georgia*, (Application No. 17767/08) at para 69; *Valkov v. Bulgaria*, (Application No. 2033/04) at para 84.

<sup>113</sup> *Ibid* at para 85. See also *Stec v United Kingdom* (Application No. 65731/01) at para 54; *Asmundsson v Iceland* (Application No. 65731/01) at para 39 and *Valkov v Bulgaria* (Application No. 2033/04) at para 84.

<sup>114</sup> *Ibid* at para 86. See also *Rasmussen v. Poland* (Application No. 38886/05) at para 76; *Richardson v. the United Kingdom* (Application No. 26252/08) at paras 17–18.

<sup>115</sup> *Ibid* at para 86. See also *Carson v United Kingdom* (Application No. 42185/05) at paras 85–89.

<sup>116</sup> *Asmundsson v Iceland* (Application No. 60669/05) at para 45.

<sup>117</sup> *Ibid* at para 45.



in *Arras v Italy*<sup>118</sup> where the ECtHR held that the harmonisation of a pension scheme which affected the applicants did not affect the basic pension entitlement. All the applicants experienced a loss of the more favourable augmentation which amounted to a 'reasonable and commensurate' reduction rather than a 'total deprivation'.<sup>119</sup> What was considered essential in *Arras* was the fact that there was no impairment of the essence of the applicant's pension rights.<sup>120</sup> Therefore, even under this line of reasoning, there does not appear to be an avenue for prospective pensioners under Article 1, Protocol 1 of the ECHR.

## 6. CONCLUSIONS

This paper has addressed the very topical issue of adjustment to pension ages in two countries which have received EU and IMF financial support as a result of the European financial crisis: Greece and Ireland. Pension ages have undergone significant reform in both of these countries, conditional upon the EU and IMF bail-outs, and this has had a significant impact on the social rights of prospective pensioners in both jurisdictions. While the changes in Greece have been more complex, the alterations to the Irish pension age are no less significant. The paper highlights a potential legal claim which may be available to such prospective pensioners: the doctrine of legitimate expectation. It analyses the current state of the law in both Greece and Ireland in relation to legitimate expectation and the potential obstacles facing prospective pensioners in both jurisdictions. It concludes that a claim for legitimate expectation will face similar obstacles in both jurisdictions.

First, in relation to the question of whether a prospective pensioner has a legitimate expectation that the pension laws will not change, it is concluded that while, in both jurisdictions, the concept of an expectation will probably be accepted as arising in certain cases, whether that expectation can be legally enforced is doubtful. In both Greece and Ireland there are substantial restrictions on the operation of the doctrine of legitimate expectation which impede its use in this context. A common restriction in both jurisdictions is the finding that such a claim would not be considered to be a legitimate one. In the Irish context, this would arise as a result of the operation of the law which, once promulgated, is applicable to the individual, so that if the individual does not meet the requirements of the law, then the claim is not a legitimate one. In Greece, similar reasoning can be identified, since once the individual is not, in good faith, able to base their claim on consistent prior administrative practice and consistent prior case-law, then the expectation is not considered to be legitimate. Equally, the restriction in Ireland that a claim for legitimate expectation will not be allowed where it would fetter the discretion of the legislature is also evident in Greece,

<sup>118</sup> *Arras v Italy* (Application No. 17972/07).

<sup>119</sup> *Ibid* at para 82.

<sup>120</sup> *Ibid* at para 83.

where it has been held in Greek jurisprudence that the legislator should be able to amend the existing legal order. Moreover, the reliance of the Irish courts on the public interest to restrict certain claims for legitimate expectation will seriously hamper any efforts to found such a claim before the Irish courts. While there have been no claims based on exactly this issue, so definitive answers cannot be given, the overall conclusion of the authors, with reference to the doctrine of legitimate expectation and its use in other contexts, is that it would be almost impossible to found a claim for legitimate expectation based on an increase in the retirement age.

The second issue that is unresolved in both jurisdictions, however, is the issue of reasonable notice and the imposition of adequate transitional periods. The second question examined in this context was whether prospective pensioners have a legitimate expectation that pension laws will not change without reasonable notice or the introduction of transitional periods. In Greece, the jurisprudence of the courts is clear: such transitional periods are not necessary. However, interesting arguments have been put forward by Greek academics in support of lengthier transitional periods in such cases. A similar approach can be identified in Ireland, where the courts have noted that there may be circumstances where such reasonable notice or transitional periods might be required to ensure the rights of individuals, however, these have been restricted to cases where the individual is challenging an administrative scheme, as opposed to a legislative enactment; as a result it is more difficult to assess what the approach of the courts would be if such an argument were to come before them.

In the case of Greece, the national legislator chose not to introduce transitional periods, based on its belief that legislators have an overriding entitlement to adjust the existing pension legislation to new economic circumstances. The Irish case is somewhat different as a transitional period of approximately two and a half years was introduced to allow prospective pensioners time to alter their current positions and prepare for a longer period at work or for retirement at 65 without a pension. However, it is arguable that this is insufficient for those intending to retire at the age of 65 or who are mandatorily required to retire at the age of 65 years, as this gives them little time to source alternative work and to gather enough finance to support them in this gap year. This is a particular problem for public sector workers who joined the public sector prior to 2004. Those who joined prior to this date must retire at the age of 65. If they are expected to retire at 65 and yet receive no state pension until the age of 66, this means that they must either find alternative work (which is particularly difficult at this age due to age discrimination) or claim unemployment benefit, or have sufficient financial resources to support them during this period. For these individuals, the case for a longer notice period or transitional period is certainly stronger than for those who can continue in work until the age of 66 years and who therefore will not suffer a change as detrimental to their finances as those who have to retire at 65. Where pension reductions have also been made in combination with this increase in retirement age, there is a potential conflict with the right to a decent standard of living

as protected by the European Social Charter and the respective Committee on Social Rights.<sup>121</sup> The answer to this second question is then inconclusive.

Finally, the paper drew on the potential for a claim under Article 1, Protocol 1 of the ECHR. However, again due to the failure of the prospective pensioners to be able to establish legitimate claims at a national level, it is more than likely that the ECtHR would hold that their claim would not constitute a 'possession' for the purposes of Article 1, Protocol 1 of the ECHR. However, in Ireland at least, there is still a lack of any clear resolution of whether the alteration of pension age has a sufficiently large effect on individual rights that it necessitates the imposition of transitional periods, or about how long such transitional periods should be. In the case of the increase of the pension age, it is arguable that the introduction of adequate transitional arrangements is required in order to allow an individual to prepare for the future. This requires a reasonable balance to be maintained between the need to reform the public pension system and the need to protect the legitimate expectations of prospective pensioners. One method of achieving this would certainly be the introduction and implementation of adequate transitional periods in all cases.

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<sup>121</sup> While a consideration of this issue is beyond the scope of this article, the authors would like to thank the anonymous reviewers for bring this point and the relevant jurisprudence to their attention. See *General Federation of Employees of the National Electric Power Corporation (GENOP-DEI) / Confederation of Greek Civil Servants' Trade Unions (ADEDY) v Greece*, (Complaint No. 65/2011), decision on the merits of 23 May 2012, at para 18. See also Complaints 78–80/2012.

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# SHOULD SOCIAL RIGHTS BE INCLUDED IN INTERPRETATIONS OF THE CONVENTION BY THE EUROPEAN COURT OF HUMAN RIGHTS?

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## *Abstract*

*The European Court of Human Rights frequently incorporates socio-economic rights in its applications of the Convention as a result of its broad interpretations of civil and political rights, while at the same time emphasising that the Convention does not actually entail socio-economic rights. This article analyses the arguments concerning the inclusion of social rights in the Court's interpretation of the provisions of the Convention. Analysis is through use of a case law study which examines how the Court legitimises the inclusion of social rights in its interpretations of the Convention despite their absence from the text of the Convention itself. Existing social rights arguments are categorised under the Convention rights provisions, revealing the extent to which including social rights within the interpretations of the Convention provisions has become established practice.*

**Keywords:** argumentation; interpretation; legitimacy; social rights; the European Convention on Human Rights; the European Court of Human Rights

## 1. INTRODUCTION

The European Convention on Fundamental Rights and Freedoms (hereinafter, the Convention) was drafted in the aftermath of the Second World War when rights were considered from a rather narrow perspective. The Convention secures civil and political rights, but economic and social rights are not included within it. The Council of Europe's legal system protects economic and social rights through the

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other Convention, namely the European Social Charter.<sup>1</sup> The European Court of Human Rights (hereinafter, the Court or the ECtHR) has frequently, however, taken socio-economic rights into account when interpreting the Convention. The rights-extending interpretation methods make this possible. For example, by applying the principle of effectiveness and the 'living instrument' interpretation, as well as through the method of positive obligations, weight may be put on socio-economic rights even though the text of the Convention does not include them.

But the question can be posed: Since economic and social rights were not initially included in the Convention, is it legitimate for the Court to include them? It has been argued that the development of economic and social norms and procedures should go hand-in-hand with legitimacy-enhancing strategies. This point of view stresses, on the one hand, the need to restrain over-anxious human rights interpretations and, on the other hand, that to avoid sticking to the drafters' intentions.<sup>2</sup> Accordingly, legitimate interpretations can be found somewhere in between.

It has been claimed that the Court has gone too far with regard to incorporating socio-economic rights within the Convention.<sup>3</sup> It has been taken for granted that, nowadays, the Court's jurisdiction also entails socio-economic rights, even though there is a lack of clear definition of them by the Court.<sup>4</sup> Yet, at the same time, it has been observed that the Court handles socio-economic rights in negative terms: the Court has stated several times what the Convention does not provide e.g. the right to housing.<sup>5</sup>

The Court frequently *de facto* incorporates socio-economic rights within the Convention through a broad interpretation of civil and political rights while, at the same time, emphasising that the Convention does not entail socio-economic rights.<sup>6</sup> The aim of this article is to analyse the arguments concerning social rights in the Court's interpretation of the Convention's provisions. This analysis is performed through a case law study which includes 87 judgments of the Court. In addition, the article examines the question of how the Court legitimises its interpretations concerning social rights when the text of the Convention does not include social rights.

In this article socio-economic rights or social rights are understood broadly.<sup>7</sup> Socio-economic rights cover all the rights which are protected in the European

<sup>1</sup> European Social Charter (revised), CETS No. 163, came into force on 1 July 1999.

<sup>2</sup> Shany (2011: 80).

<sup>3</sup> Bossuyt (2007).

<sup>4</sup> Clements and Simmons (2008: 426) ('the Court's starting point is now an unequivocal acceptance of the view that the Convention protects a core irreducible set of such rights.'). See also Gerards (2014: 104) and Leijten (2014: 115).

<sup>5</sup> See e.g. *M.S.S. v. Belgium and Greece*, 30696/09, 21 January 2011, GC, para. 249; See more, Leijten (2014: 114).

<sup>6</sup> Bossuyt (2013: 35).

<sup>7</sup> In this article the concepts of 'socio-economic rights', 'social rights' and 'economic and social rights' are used interchangeably.



Social Charter, the Charter of Fundamental Rights of the European Union<sup>8</sup> and the International Covenant on Economic, Social and Cultural Rights<sup>9</sup>, as well as in several Conventions of the International Labour Organisation (the ILO).<sup>10</sup> Cultural rights are, however, set aside and the focus is on economic and social rights.

If legitimacy is understood in a purely formalistic and strictly conservative sense, it is not legitimate to incorporate economic and social rights into the Convention.<sup>11</sup> But if instead, legitimacy is understood in a substantive sense, the chain of reasoning is no longer that simple. Substantive legitimacy emphasises that the *content* of the judgment must be justified and acceptable in order to be legitimate. Especially in human rights cases, the emphasis should be on the content – and not merely on the formalistic aspects.<sup>12</sup>

In this article, substantive legitimacy is taken as a starting point, which means that the reasoning of the Court will be kept in focus. Legitimacy is taken to mean the extent to which the Court has fulfilled the promise of its constitutive legitimacy through its decisions and through the interpretive principles that guide its decision-making processes. The focus is on how well the Court is perceived to actually protect human rights. This view of legitimacy concentrates on the performance of the Court, and, consequently, the Court either contributes to or takes away from its legitimacy through its performance. This view of legitimacy is called the normative performance dimension.<sup>13</sup> The article analyses in detail the arguments which the Court gives when extending its interpretation by adding economic and social rights to the Convention.

In addition to the chosen view point of normative performance legitimacy, the other chosen standpoint in this article is the principle of the indivisibility of human rights: ‘All human rights are universal, indivisible and interdependent and interrelated’.<sup>14</sup> The principle of indivisibility stresses that the distinction between different categories of human rights should not lead to any watertight compartmentalisation between, for

<sup>8</sup> OJ C 326, 26.10.2012: 391–407.

<sup>9</sup> GA res 2200A (XXI), 21 UN GAOR sup (No. 16) at 49, UN doc A76316 (1966), 993 UNTS 3.

<sup>10</sup> See e.g. Forced Labour Convention, 1930 (No. 29); Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); Minimum Age Convention, 1973 (No. 138); Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

<sup>11</sup> Formalism in the ECtHR’s praxis is understood as the necessity to ‘draw the line somewhere’ in order to create certainty and steadiness (de Lange 2009: 454). For more on formal legitimacy, see Barkhuysen and van Emmerik (2009) and Thomassen (2009). The more persistent argument is that socio-economic rights adjudication is anti-democratic. The role of nationally elected representatives is usurped when courts pass judgments on matters of social policy. Additional argument against social rights adjudication is based on the principle of separation of powers. See more and also counter-arguments, Langford (2008: 31–35).

<sup>12</sup> The content is inevitably the starting point in theories of constitutional rights, see Alexy (2002); Dworkin (1987).

<sup>13</sup> Çali (2011: 9).

<sup>14</sup> Vienna Declaration, World Conference on Human Rights, 14–25 June 1993, UN Doc. A/CONF.157/24, para. 5.

instance, civil, political or social rights.<sup>15</sup> This is also the reason why the Convention cannot isolate itself from the influence of social rights.

This article focuses on the general method by which social rights should be read within the Convention through a broad interpretation of civil and political rights. The difficult methodological question is how to find relevant cases, i.e. what search terms should be used. Since interpretation of positive obligations has been the Court's main method for extending the scope of Convention provisions, using the search term 'obligations' seems a well-justified methodological choice.<sup>16</sup> In addition, 'social rights' or 'economic rights' were indicated in the search field. There were no time-limits in the search, and the outcome was eighty-seven identified cases.

## 2. BACKGROUND FOR JUSTICIABLE ECONOMIC AND SOCIAL RIGHTS: REASONS TO INCLUDE THEM

Economic and social rights have traditionally been described as rights which are not fulfilled without positive actions by the state, whereas civil and political rights are seen as being easier for states to fulfil. The view has been that social rights need money and resources, while civil and political rights are fulfilled, basically, by non-interference by the state. Traditional arguments against justiciable social rights stress that social rights are ensured through a combination of flexible terms, broad powers of discretion and generous limitation provisions that call for progressive implementation.<sup>17</sup> On the other hand, however, some researchers have declared that the debate over the distinction between civil or political rights and social rights is nearly over.<sup>18</sup>

There are well-known challenges to litigating and implementing vague and resource-dependent social rights, such as the following: a lack of adequate standing provisions and procedural innovations; conservative judiciaries and powerful opponents; a lack of financial and legal sources; and the challenges of trying to effectively connect claimant communities, social movements and legally-oriented human rights advocates and ensure that decisions are implemented.<sup>19</sup> However, it has been strongly suggested that practice has challenged the theoretical obstacles in the debate over the justiciability of social rights.<sup>20</sup>

<sup>15</sup> See more on the notion of indivisibility, interdependence and interrelation of human rights, e.g. Eide (2001); Koch (2003) and Nickel (2008).

<sup>16</sup> The Court operates frequently with obligations arguments (not only including positive obligations, but also obligations more generally) when determining whether to extend interpretations, see e.g. Shany (2011: 79).

<sup>17</sup> See rather recent arguments against justiciable social rights, Dennis and Stewart (2004); Mapulanga-Hulston (2002).

<sup>18</sup> See Clements and Simmons (2008: 409); Scheinin (2005: 17).

<sup>19</sup> See Langford (2003: 20–22).

<sup>20</sup> Langford (2008: 43).

There are strong arguments for social rights, too. As to the vague nature of social rights, they are phrased no differently than civil and political rights. It has been pointed out that it is arguable that ‘open-textured framing’ of all human rights is to be favoured.<sup>21</sup> Furthermore, as to the stylistic construction and resources argument, scholars have long noted that social rights require not only the state’s action, but also its restraint. And the opposite argument that civil and political rights would be cheaper to provide has been seriously questioned. Consequently, the enforcement of civil and political rights often needs the state’s positive actions as well.<sup>22</sup>

There is undeniably a developing consensus in the existing literature that economic and social rights are internationally justiciable and can be meaningfully enforced by international courts and tribunals.<sup>23</sup> Scholars have formulated an integrated approach to interpretations of human rights treaties. This approach is primarily based on the idea that civil and political rights have inherent socio-economic components.<sup>24</sup> It has been stressed that the present interpretive practice undertaken by the ECtHR, and the other international human rights bodies, with regard to positive obligations leads eventually to taking into consideration economic and social rights.<sup>25</sup>

In the context of the European Convention on Human Rights, the Court stated in the *Airey* case in 1979 that:

Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. [...] there is no water-tight division separating that sphere from the field covered by the Convention.<sup>26</sup>

Since then, the Court has taken a few steps back from the *Airey* formulation and now the incorporation of socio-economic rights is more cautious and conservative.<sup>27</sup> Socio-economic rights have, *de facto*, become part of the Convention through different routes. Firstly, the Court has determined that proceedings concerning social rights must be considered under the Article of fair trial (Article 6).<sup>28</sup> The fair trial clause has been considered to be the starting point for the most important interpretations that give some protection to economic and social rights.<sup>29</sup> Secondly, the general non-

<sup>21</sup> Nolan, Porter and Langford (2009: 11).

<sup>22</sup> Eichenhofer (2011: 635) (*‘Menschenrechtsschutz gelingt nicht durch Staatliche Inaktivität, sondern erfordert stets und notwendig konkrete gesetzgeberische und administrative Schutzmaßnahmen.’*). See also Langford (2008: 30–31).

<sup>23</sup> Eide, Krause and Rosas (2001); Langford (2008: 43); Shany (2011).

<sup>24</sup> Mantouvalou (2005: 573–575); Scheinin (2001: 32–42).

<sup>25</sup> See Shany (2011: 79).

<sup>26</sup> *Airey v. Ireland*, 6289/73, 1979, para. 26.

<sup>27</sup> See Mantouvalou (2005: 574).

<sup>28</sup> See more about the technique by which social rights are indirectly protected under the Convention through procedural guarantees, Brems (2011: 157–158); Scheinin (2001: 34–38); *Koskinas v. Greece*, 47760/99, 20 June 2002.

<sup>29</sup> Scheinin (2001: 34).

discrimination provision (Article 14) has provided a way to 'socialise' the Convention and it has been claimed that, in the future, non-discrimination provisions will be the most important mechanism for protecting social rights in the Convention system.<sup>30</sup> Thirdly, social rights have been incorporated within the Convention through a broad interpretation of the scope of civil and political rights.<sup>31</sup> For example, welfare benefits and entitlements have been interpreted as 'possessions' or 'property' under Article 1 of Protocol No. 1.<sup>32</sup>

The non-discrimination clause of the Convention in Article 14 is not an independent provision. It forbids discrimination only in 'the enjoyment of the rights and freedoms set forth in the Convention' and, hence, can only be invoked in conjunction with another article in the Convention or its protocols. The Twelfth Additional Protocol came into force on 1<sup>st</sup> April 2005.<sup>33</sup> This protocol sets forth a general, independent prohibition in discrimination in the law and by public authorities. Currently this Protocol has been ratified by eighteen of the forty-seven Member States.<sup>34</sup>

There was much hope that social rights would be included within the Convention through the provision of a general prohibition of discrimination. It was anticipated that it would be possible to contest restrictions on social rights before the Court, and that this would be the case not only for those based on the 'typical' discrimination grounds, such as gender, nationality and sexual orientation, but also for those grounded on the many discriminatory distinctions commonly present in social policy and legislation, such as age and state of health. Consequently, the Twelfth Protocol enables almost all violations of social rights to be framed as discrimination issues.<sup>35</sup> Article 1 of Protocol No. 12 has, however, been applied only three times and the interpretation has been rather conservative.<sup>36</sup>

<sup>30</sup> Brems (2011: 158). Eichenhofer (2011: 629–633) has a similar main categorisation: (1) *Zugang zu Gericht*, (2) *Eigentumsgarantie*, (3) *Diskriminierungsverbote*.

<sup>31</sup> Brems (2011: 138–157).

<sup>32</sup> See, e.g., *Gaugusuz v. Austria*, 17371/90, 16 September 1996; *Koua Poirrez v. France*, 40892/98, 30 September 2003. In the legal literature there have been also other ways to categorise socio-economic rights in judicial human rights adjudication, for example, Scheinin's categorisations: 1) non-discrimination Article, 2) procedural safeguards, 3) economic and social rights as limitations to other rights, 4) other potential instances of the integrated approach (Scheinin 2001: 34–42). Clements and Simmons have two groups: 1) gross socio-economic deficits directly or indirectly attributable to state action, 2) gross socio-economic destitution for which the state has no direct or obviously indirect responsibility (Clements and Simmons 2008: 409–427). O'Cinneide has three 'gateways': 1) Article 3. Destitution as 'inhuman and degrading treatment', 2) Article 2. Destitution as a threat to life; 3) Destitution as threat to meaningful private, home and family life (O'Cinneide 2008).

<sup>33</sup> Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms CETS No.: 177.

<sup>34</sup> This is the situation on 19 June 2014.

<sup>35</sup> Brems (2011: 163); see also more on how anti-discrimination legislation promotes economic and social rights, De Witte (2013).

<sup>36</sup> See the cases where Article 1 of Protocol No. 12 has been applied: *Maktouf and Damjanović v. Bosnia and Herzegovina*, 2312/08, 34179/08, 18 July 2013, GC (no violation of Article 1 of Protocol

Also an additional protocol of social rights has been proposed that would extend the Convention system to certain economic and social rights. This, however, was rejected by the Member States and their wish was to strengthen the mechanism of the European Social Charter.<sup>37</sup> The Court has, interestingly, seen this as an argument in support of the existence of a consensus among Contracting States to promote economic and social rights when interpreting the Convention.<sup>38</sup>

Although the incorporation of economic and social rights into the Convention can be explained by the fact that there is no ‘water-tight distinction’ between socio-economic and civil and political rights issues, and the Court, in practice, frequently gives weight to socio-economic rights, applicability of the economic and social rights in the Convention remains a sensitive issue.<sup>39</sup> There are also some discordant voices: it has been strongly argued that the Convention does *not* protect economic and social rights either explicitly or implicitly. The Convention instead protects economic and social *aspects*.<sup>40</sup> This debate is, however, rather artificial and differences in views are more a matter of degree than constituting actual disagreement.

### 3. CASE LAW ANALYSIS: THE INTERPRETATIVE INFLUENCE OF ECONOMIC AND SOCIAL RIGHTS

In this section, arguments concerning social rights are analysed in order to find out how social rights have been incorporated within the Convention through the Court’s interpretations. The overarching question is: how does the Court justify its interpretations? The case law data consists of eighty-seven judgments, and the arguments with regard to social rights and their justifiability have been analysed carefully. The emphasis was on the reasoning of the Court, looking at how broadly social rights are taken into consideration and on which sources or arguments the Court relies when justifying its extensive interpretations.

The adopted categorisation follows the work of Cousins, who categorises the influence of social rights on each of the Convention provisions.<sup>41</sup> Access to courts (Article 6) and the non-discrimination provision (Article 14) are, however, left aside in this article. The case law is, on the whole, clear with regard to Article 6 and social rights. In *Bulgakova*, the Court stated: ‘[...] It is beyond doubt that pensions and

No. 12); *Sejdić and Finci v. Bosnia and Herzegovina*, 27996/06, 34836/06, 22 December 2009, GC (violation of Article 1 of Protocol No. 12); *Savez Crkava “Rijec Zivota” and Others v. Croatia*, 7798/08, 9 December 2010 (violation of Article 14 in conjunction with Article 9, hence, no need to examine the complaint under Article 1 of Protocol No. 12).

<sup>37</sup> Recommendation 1415 (1999) Additional protocol to the European Convention on Human Rights concerning fundamental social rights.

<sup>38</sup> See *Demir and Baykara v. Turkey*, 34503/97, 12 November 2008, GC, para. 84.

<sup>39</sup> See likewise Leijten (2013) p. 180; Clements and Simmons (2008: 426).

<sup>40</sup> Warbrick (2007: 241).

<sup>41</sup> Cousins (2008).

related benefits, which are purely economic in nature, are ‘civil’ rights within the meaning of Article 6. [...].<sup>42</sup> Also the non-discrimination provision and its social rights dimensions have already been studied.<sup>43</sup> This article has chosen to present the most representative examples of each category where social rights’ influence is present.

### 3.1. CATEGORY 1: INHUMAN OR DEGRADING TREATMENT (ARTICLE 3)

The Grand Chamber case of *M.S.S. v. Belgium and Greece* concerned an asylum seeker who claimed that his rights under Article 3 had been violated.<sup>44</sup> The applicant claimed, *inter alia*, that the state of extreme poverty in which he had lived since he arrived in Greece amounted to inhuman and degrading treatment. The Grand Chamber stated that Article 3 does not cover an obligation for states to provide everyone in their jurisdiction with a home. Nor does Article 3 entail any general obligation to give refugees financial assistance to enable them to maintain a certain standard of living.<sup>45</sup> In the case in question, the Greek authorities were, however, bound to comply with their own legislation which transposes European Union law. The Union Directive 2003/9 lays down minimum standards for the reception of asylum seekers in the Member States. There is thus an obligation to provide accommodation and decent material conditions to impoverished asylum seekers.<sup>46</sup>

The Court had to determine whether, in the context of the Convention, a situation of extreme poverty and poor living conditions could raise an issue under Article 3. The Court emphasised that the applicant had lived for months in a state of the most extreme poverty: the applicant was unable to satisfy his most basic needs (for food, hygiene and place to live). Furthermore, his situation was not likely to improve in the near future.<sup>47</sup>

The Court came to the conclusion that the applicant had been the victim of humiliating treatment:

[...] the Greek authorities have not had due regard to the applicant’s vulnerability [...] and must be held responsible [...] for the situation in which [the applicant] has found himself for several months, living in the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs. [...] such a living conditions [...] have attained the level of severity required to fall within the scope of Article 3 [...].<sup>48</sup>

<sup>42</sup> *Bulgakova v. Russia*, 69524/01, 18 January 2007, para. 30 (emphasis added by the author). See other Article 6 cases, *K.M.C. v. Hungary*, 19554/11, 10 July 2012; *Lobo Machado v. Portugal*, 15764/89, 20 February 1996; *Couez v. France*, 94/1997/878/1090, 24 August 1998; *Annoni di Gussola and Others v. France*, 31819/96, 33293/96, 14 November 2000; see also Cousins (2008: 107–129).

<sup>43</sup> See Brems (2011: 158–162); Cousins (2008, 2009); and Leijten (2013).

<sup>44</sup> *M.S.S.* (note 5).

<sup>45</sup> *Ibid.* para. 249.

<sup>46</sup> *Ibid.* para. 250.

<sup>47</sup> *Ibid.* para. 254.

<sup>48</sup> *Ibid.* para. 263.

The majority, by sixteen judges, held that there has been a violation of Article 3. One dissenting judge notes the extension of Article 3: '[...] the Court did in fact admit the possibility of social welfare obligations of the State in the context of Article 3. It did so in the name of dignity, and relying on a theory of positive obligations of the State.'<sup>49</sup>

The Court justified its extension of the interpretation of Article 3 by relying on the broad consensus at international and European level concerning the need for special protection for asylum seekers. It pointed out that, for instance, the Geneva Convention, the activities of the United Nations Human Rights Council and the commonly applied standards set out in the European Union Directive all show a consensus over protection of asylum seekers.<sup>50</sup> Since the need for protection is so well-founded and commonly shared, the Court decided to expand Article 3 to include the right for asylum seekers to certain living conditions.

A right to medical care in prison arose in the *Güveç* case.<sup>51</sup> The applicant complained that he suffered from psychological problems in prison and received no medical care. According to the applicant, this amounted to inhuman and degrading treatment under Article 3.

The Court pointed out that the ill-treatment must meet the minimum level of severity in order to fall within the scope of Article 3. The applicant was only fifteen years old and he was detained in a prison with adult prisoners. The applicant was detained for five years. Furthermore, the applicant had no adequate legal representation until five years after he was first detained. These circumstances caused the applicant psychological problems which tragically led to his repeated attempts to take his own life.

The Court considered the duty to provide medical care under Article 3: '[...] the national authorities were not only directly responsible for the applicant's problems, but also manifestly failed to provide adequate medical care for him. [...].'<sup>52</sup> The ECtHR continued: 'Indeed, [...] the trial court not only failed to ensure that the applicant received medical care, but even prevented him and his family from doing so by refusing to release him on bail [...].'<sup>53</sup>

The ECtHR determined that Article 3 'imposes an obligation on the State to protect the physical well-being of persons deprived of their liberty, for example by providing them with the requisite medical assistance [...].'<sup>54</sup> The Court concluded unanimously that the applicant was subjected to inhuman and degrading treatment, and accordingly, there had been a violation of Article 3.

<sup>49</sup> Partly concurring and partly dissenting opinion of Judge Sajó: 102.

<sup>50</sup> *M.S.S.* (note 5), paras. 251, 263.

<sup>51</sup> *Güveç v. Turkey*, 70337/01, 20 January 2009.

<sup>52</sup> *Ibid.* para. 93.

<sup>53</sup> *Ibid.* para. 95.

<sup>54</sup> *Ibid.* para. 96.



The Court does not have to do much in order to justify the positive obligation to provide medical assistance for persons deprived of their liberty: it is fairly self-evident that such an obligation must exist in order to protect everyone's right to life. The circumstances and negligence in the actions of the national authorities (both the prison authorities and the trial court) were so obvious in this case that the justification for the Court's decision does not require further reasoning.

### 3.2. CATEGORY 2: RESPECT FOR PRIVATE AND FAMILY LIFE (ARTICLE 8)

In *Kurić and Others v. Slovenia*, eight applicants claimed that the state had violated Article 8 since they had been arbitrarily deprived of the possibility of preserving their status as permanent residents in Slovenia.<sup>55</sup> Permanent residents have many social rights, such as the right to a pension, the right to health insurance and to better work opportunities.

The background to this case was that the applicants were citizens of the former Socialist Federal Republic of Yugoslavia (the SFRY), and after Slovenia became independent the applicants did not apply for Slovenian citizenship. Consequently they became aliens unlawfully residing on Slovenian territory. Their names were 'erased' from the Register of Permanent Residents.

Interference in this case was quite clear because the state did not contest that the 'erasure' and its repercussions had had an adverse effect on the applicants and amounted to an interference with their private and family life under Article 8. The Grand Chamber did not depart from its previous findings in finding that the 'erasure' had interfered with their Article 8 rights and continued to do so.<sup>56</sup>

Next, the Grand Chamber had to examine whether the interference was justified. To be justified the interference had to be 'in accordance with law', pursue 'a legitimate aim' and be 'necessary in a democratic society'. The Court found that the Slovenian legislation and administrative practice which resulted in the 'erasure' lacked the requisite standards of foreseeability and accessibility. Consequently, the Court came to the conclusion that the interference was not 'in accordance with law'.<sup>57</sup> Normally, when finding that the first justification requirement is not fulfilled, the Court concludes that there is a violation and does not examine the two latter requirements at all. In this case, however, the Court considered it necessary to examine the latter two requirements (legitimate aim and necessity).<sup>58</sup>

Its analysis of legitimate aim was rather brief, and the outcome was that the Court ruled that the state had a legitimate aim (to protect the country's national security).<sup>59</sup>

<sup>55</sup> *Kurić and Others v. Slovenia*, 26828/06, 26 June 2012, GC.

<sup>56</sup> *Ibid.* para. 339.

<sup>57</sup> *Ibid.* paras. 346, 349.

<sup>58</sup> *Ibid.* para. 350.

<sup>59</sup> *Ibid.* paras. 351–353.

Social rights come into play when the Court examined the necessity requirement. The Court stated:

[...] the applicants [...] enjoyed a *wide range of social and political rights*. Owing to the 'erasure', they experienced a number of adverse consequences, such as [...], loss of job opportunities, loss of health insurance, the impossibility of renewing identity documents or driving licences, and difficulties in regulating pension rights. [...].<sup>60</sup>

The Court also reminded the state of its positive obligations under Article 8 including that of ensuring *effective* respect for private and family life.<sup>61</sup> After drawing attention to the positive obligations, the Court emphasised that the regularisation of the residence status of the former SFRY citizens was a necessary step which the state should have taken in order to ensure that failure to obtain Slovenian citizenship would not disproportionately affect Article 8 rights of the 'erased'. The Court concluded:

The absence of such regulation and the prolonged impossibility of obtaining valid residence permits have upset the fair balance which should have been struck between the legitimate aim of the protection of national security and effective respect for the applicants' right to private or family life or both.<sup>62</sup>

The Court was creative in its inclusion of social rights within the scope of Article 8: social rights belong to the effective respect of private and family life. Consequently, when evaluating whether the state has respected private and family life effectively, social rights, such as the right to health insurance and pension rights, must be taken into account. Furthermore, the Court unanimously emphasised the grave consequences of the 'erasure' of applicants' Article 8 rights.<sup>63</sup> Consequently, the interference was not necessary in a democratic society, and thus there was a violation of Article 8. This case is particularly representative of the incorporation of social rights within the scope of traditional civil and political rights: effective respect of private and family life also contains grounds for the fulfilment of social rights.

In *Fadeyeva v. Russia* a social right to health and well-being under Article 8 was in question.<sup>64</sup> The applicant's home was located near a steel plant. The applicant complained before the ECtHR that there had been a violation of Article 8 on account of the state's failure to protect her private life and home from severe environmental nuisance arising from the steel plant. The Government contested the applicability of Article 8 in this case. Therefore, the Court had first to decide whether the situation providing the subject of the applicant's complaint fell under Article 8.

<sup>60</sup> *Ibid.* para. 356. (emphasis added by the author).

<sup>61</sup> *Ibid.* para. 358 (emphasis added by the author).

<sup>62</sup> *Ibid.* para. 359.

<sup>63</sup> *Ibid.* para. 360.

<sup>64</sup> *Fadeyeva v. Russia*, 55723/00, 9 June 2005.

The Court emphasised that, in order to raise an issue under Article 8, the interference must directly affect the applicant's home, family or private life. In addition, the adverse effects of environmental pollution must attain a certain minimum level in order to fall within the scope of Article 8. The Court then pointed out that the official documents submitted confirmed that the environmental pollution at the applicant's place of residence had constantly exceeded safety levels. Moreover, the ECtHR paid special attention to the fact that the domestic courts recognised the applicant's right to be resettled. Additionally, domestic legislation itself defined the zone in which the applicant's home was situated as unfit for habitation. Therefore, the national courts had already recognised the existence of interference with the applicant's private sphere.<sup>65</sup>

The Court evaluated the applicant's claim that the pollution has been harmful to her health and well-being. The Court points out that, in this case, a very strong combination of indirect evidence and presumptions made it possible to conclude that the applicant's health deteriorated as a result of her prolonged exposure to the industrial emissions from the steel plant. The Court continued:

Even assuming that the pollution did not cause any quantifiable harm to her health, it inevitably made the applicant more vulnerable to various illnesses. Moreover, there can be no doubt that it adversely affected her quality of life and home. Therefore, the Court accepts that the actual detriment to the applicant's health and well-being reached a level sufficient to bring it within the scope of Article 8 [...].<sup>66</sup>

The Court analysed the complaint in terms of a positive duty on the state to take reasonable and appropriate measures to secure the applicant's rights under Article 8(1).<sup>67</sup> Next, the Court formulated two positive obligations which can arise from the effective enjoyment of right to respect of home or private life in the present case: obligation to resettle the applicant and obligation to regulate private industry.

The Court unanimously concluded that the state had not fulfilled these positive obligations and, therefore, had failed to strike a fair balance between the interests of the community and the applicant's *effective* enjoyment of her right to respect for her home and private life. Accordingly, there had been a violation of Article 8.

The outcome was in favour of the right to health and well-being. The Court, however, did not directly declare any social rights within its reasoning. There were no references to the social rights conventions or instruments which protect everyone's right to health internationally. The Court emphasised effective enjoyment of the right to private life and home and declared that there was a positive obligation on the state to resettle the applicant away from the place where her health is at risk. The argumentation could have been stronger and the Court could have stated the right to

<sup>65</sup> *Ibid.* paras. 81–86.

<sup>66</sup> *Ibid.* para. 88.

<sup>67</sup> *Ibid.* para. 89.

health more clearly and directly by, for example, referring to Article 11 of the Social Charter (right to health).

### 3.3. CATEGORY 3: RIGHT TO POSSESSION (ARTICLE 1 OF PROTOCOL NO. 1)

Article 1 of Protocol No. 1 has been considered by the ECtHR in a very wide range of social security cases in which social security is seen as possession.<sup>68</sup> The ECtHR has confirmed that states have a wide margin of appreciation with regard to national social security schemes. However, when legislation regulating access to such a scheme exists, it must be compatible with the non-discrimination provision (Article 14). The Court stated in *Luczak*:

[...] even where weighty reasons have been advanced for excluding an individual from the scheme, such exclusion must not leave him in a situation in which he is denied any social insurance cover, [...] thus posing a threat to his livelihood. Indeed, to leave [...] person bereft of any social security cover would be incompatible with current trends in social security legislation in Europe.<sup>69</sup>

The Court unanimously concluded, emphasising the social rights' perspective, that even though the state clearly has a wide margin of appreciation in the area of social security, the Government had failed to adduce any reasonable and objective justification for the distinction in order to meet the requirements of Article 14.<sup>70</sup> Therefore, there was a violation of Article 14 taken in conjunction with Article 1 of Protocol No. 1.

It must, however, be pointed out that the incorporation of social rights within the Convention is fully dependent on the individual national legislations concerning social rights. The Court in its interpretations of Convention provisions *de facto* protects and gives weight to nationally provided social rights. Thus, if the state decides to create a benefits scheme, it must do so in a manner which is compatible with the non-discrimination provision.<sup>71</sup>

Social rights may also be involved under Article 1 of Protocol No. 1 as counter arguments to interference with property rights. In *Ghigo*, the case concerned balancing a landlord's property rights against the tenants' social rights.<sup>72</sup> The applicant's house

<sup>68</sup> See Cousins (2008: 17–45).

<sup>69</sup> *Luczak v. Poland*, 77782/01, 27 November 2000, para. 52.

<sup>70</sup> *Ibid.* para. 59; see cases of social security as a possession and non-discrimination involved e.g. *Koua Poirrez v. France*, (note 32); *Stec and Others v. The United Kingdom*, 65731/01, 65900/01, 12 April 2006, GC.

<sup>71</sup> This similar interpretation praxis is also common to the UN Human Rights Committee, which interprets the International Covenant on Civil and Political Rights by giving weight to national social rights provisions, see e.g. Communication No. 182/1984, *F.H. Zwaan-de Vries v. The Netherlands*.

<sup>72</sup> *Ghigo v. Malta*, 31122/05, 26 September 2006.

was seized by the Government under a requisition order. The house was let to a tenant and the applicant was entitled to receive a requisition rent for the use of his property. However, no rent had ever been fixed or offered to the landlord. The applicant invoked Article 1 of Protocol No. 1 and complained before the ECtHR that, due to the requisition order, he had lost control of his property for a long period of time, and he had been obliged to bear the obligations of a landlord without obtaining any compensation.

The Government pointed out that the state had a general interest in controlling the use of property. The general interest aimed at ensuring a just distribution and effective use of housing resources. It was maintained that the requisition order provided a right to housing and certain living conditions for everyone.

The second paragraph of Article 1 of Protocol No. 1 states that Contracting States are entitled to control the use of property in the general interest. Next, the Court examines whether the state's measures are lawful, whether it had pursued 'a legitimate aim' and whether 'a fair balance had been struck' between the means employed and the aim sought to be realised.

The lawfulness of the measures was quickly ascertained (the national legislation fulfilled the accessible, precise and foreseeable criteria).<sup>73</sup> Next, the Court evaluated whether the Maltese authorities had pursued a legitimate aim in the general interest. The Court reiterated that the notion of general interest was necessarily extensive. Further, the Court noted that the national authorities were, in principle, in a better position than an international judge to appreciate what was in the general interest. The Court accepted the Government's argument that the requisition and the rent control were aimed at ensuring the just distribution and use of housing resources.<sup>74</sup> The Court mentioned explicitly that: 'These measures, implemented with a view to securing the social protection of tenants [...], were also aimed at preventing homelessness, as well as protecting the dignity of poorly-off tenants [...].'<sup>75</sup> Consequently, the impugned legislation had a legitimate aim.

Finally, the Court evaluated whether a fair balance had been struck between the general interest of the community and the applicant's right to the peaceful enjoyment of his possessions. In other words, the Court ascertained whether the landlord had to bear a disproportionate and excessive burden due to the state's interference. In this connection, the Court referred to the doctrine that the landlord's property rights must be 'practical and effective'.<sup>76</sup> The Court considered that the landlord had little or no influence on the choice of tenant or the essential elements of such an agreement. Furthermore, the Court observed that the compensation for the loss of control over his property was extremely low (less than € 5 per month) and could hardly be seen as

<sup>73</sup> *Ibid.* paras. 51–53.

<sup>74</sup> *Ibid.* paras. 55–57.

<sup>75</sup> *Ibid.* para. 58.

<sup>76</sup> *Ibid.* para. 62.

fair. In addition, the requisition had already lasted for 22 years. Taking all these things into account, the Court unanimously concluded that a disproportionate and excessive burden had been imposed on the applicant.<sup>77</sup> Thus, a fair balance had not been struck and there had been a violation of the applicant's property rights.

The Court took the state's wide margin of appreciation into account and stressed, when the social housing was involved, that the national authorities must have considerable discretion in deciding on the extent of control over the use of individual property. However, the Court stressed that the discretion was not unlimited and that its exercise cannot entail consequences at variance with Convention standards.<sup>78</sup> The Court's reasoning with regard to prioritising the landlord's property rights over the tenants' social rights seems justified. The Court did not underestimate the aim of the state in protecting the social rights of others when controlling and limiting the applicant's property rights. The disproportionality of the interference is rather obvious and if the state had managed to ease the consequences of its interference, the violation would have probably not been judged to have occurred.

The interference with landlords' property rights in order to protect housing rights of others has been in focus also in the Grand Chamber *Hutten-Czapska* case.<sup>79</sup> The same question had been decided by the Court before, for example, in the *Scalabrino*<sup>80</sup> and *Mellacher*<sup>81</sup> cases, in which the Court emphasised increasing social justice as a legitimate general interest justifying the limitation of landlords' property rights, and consequently, found no violation of Article 1 of Protocol No. 1.<sup>82</sup> In *Hutten-Czapska* the Court fully recognised the difficulty of achieving a balance between social rights and landlords' property rights:

It is true that [...] the Polish State [...] had to balance the exceptionally difficult interests of landlords and tenants. It had, on the one hand, to secure the protection of property rights of the former and, on the other, to respect the social rights of the latter, often vulnerable individuals [...].<sup>83</sup>

In these cases, the state's aim is to protect the social rights of tenants, and therefore it limits the Convention provision of the landlords' right to property. From the point of view of social rights, the state is doing the right thing. This was explicitly admitted by the Court when it accepted the protection of the social rights of others

<sup>77</sup> *Ibid.* paras. 64–66, 69.

<sup>78</sup> *Ibid.* paras. 67–68.

<sup>79</sup> *Hutten-Czapska v. Poland*, 35014/97, 19 June 2006, GC.

<sup>80</sup> *Spadea and Scalabrino v. Italy*, 12868/87, 28 September 1995.

<sup>81</sup> *Mellacher and Others v. Austria*, 10522/83, 11011/84, 11070/84, 19 December 1989.

<sup>82</sup> It is worth mentioning that in *Scalabrino* (note 80) and *Mellacher* (note 81) the Court is not directly arguing for social rights, but instead, for social justice. Arguments based on rights have clearly become more visible and explicit in the twenty-first century.

<sup>83</sup> *Hutten-Czapska* (note 79), para. 225.

as a legitimate general interest for interfering with property rights.<sup>84</sup> However, the principle of proportionality must be kept in mind: the interference should not impose a disproportionate burden on landlords. In the Court's practice this means that the level of rent should be sufficiently near the current market value, and the landlord should have some right to influence the contractual aspects of the tenancy. This sounds fairly acceptable and justified: the protection of social rights should not be done at any cost and by neglecting the principle of proportionality.

### 3.4. CATEGORY 4: FREEDOM OF ASSOCIATION (ARTICLE 11)

In the Grand Chamber case *Demir and Baykara*, the incorporation of wider trade-union rights within Article 11 was in question.<sup>85</sup> Article 11(1) covers everyone's right to form and to join trade unions. The applicants complained before the ECtHR that the domestic courts had denied them the right to form trade unions and to enter into collective agreements. The main question was whether the Convention includes the right for municipal civil servants to form trade unions and the right to bargain collectively.

The Court started its reasoning exceptionally by outlining how international instruments affect the interpretation of the Convention. This was necessary since the respondent Government had argued that the Court was not entitled to create, by way of interpretation, any new obligations not already provided in the Convention. Turkey was not a party to Article 5 (the right to organise) or Article 6 (the right to bargain collectively) of the European Social Charter. The Court strongly rejected the Government's claim that international instruments should not affect the interpretation of the Convention. The Court stressed that Articles 31 to 33 of the Vienna Convention determine the meaning of the terms and phrases used in the Convention. Furthermore, the Court reiterated the practical and effective interpretation and living instrument method. In addition, the Court stated that it must also always take into account any relevant applicable rules and principles of international law.<sup>86</sup>

Next, the Court pointed out that, when there is a set of rules and principles that are accepted by the vast majority of states or in international treaties, these 'reflect a reality that the Court cannot disregard when it is called upon to clarify the scope of a Convention provision'.<sup>87</sup> Furthermore, the Court reiterated that it has never distinguished between sources of law according to whether or not they had been signed or ratified by the respondent state.<sup>88</sup>

<sup>84</sup> This line of reasoning is similar to the case law of the Court of Justice of the European Union (fundamental rights are a legitimate reason to limit the free movement of goods), see e.g. C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v. Republik Österreich*, 12 June 2003, GC.

<sup>85</sup> *Demir and Baykara* (note 38).

<sup>86</sup> *Ibid.* paras. 65–68.

<sup>87</sup> *Ibid.* para. 76.

<sup>88</sup> *Ibid.* para. 78.



The Court pointed out that the member states declined to create an additional protocol of social rights within the Convention in 1999. The argument for declining the additional protocol of social rights was that, instead of creating a new protocol within the Convention, the mechanism of the European Social Charter should be strengthened. In relation to this case, the Court viewed this argument as a general wish in support a consensus among states to promote economic and social rights. The Court continued, and there might be some sarcasm involved: 'It is not precluded from taking this general wish of Contracting States into consideration when interpreting the provisions of the Convention.'<sup>89</sup>

Turning to the detail of the present case, according to Article 11(2), lawful restrictions may be imposed on the exercise of these rights by members of the administration of the state. The applicants were municipal civil servants. The Court stressed that municipal civil servants, who are not engaged in the administration of the state as such, cannot in principle be treated as members of the administration of state and, accordingly, be subject on that basis to a limitation of their right to organise and to form trade unions. After stating its interpretation under Article 11, the Court drew support to the right of public officials to form trade unions from the ILO Convention of Freedom of Association and Protection of the Right to Organise.<sup>90</sup>

Continuing with the ILO Committee's considerations, the Court pointed out that the right of public officials to join trade unions is established several times, the only admissible exceptions to the right to organise concerning the armed forces and the police.<sup>91</sup> The Court added that the ILO Committee on Freedom of Association adopted the same line of reasoning as regards municipal civil servants.<sup>92</sup> Next, the Court referred to the European Social Charter to support its view.<sup>93</sup>

The Court also referred directly to Recommendation No. R (2000) 6 of the Committee of Ministers of the Council of Europe and European Union's Charter of Fundamental Rights, in which trade union rights had been recognised for civil servants.<sup>94</sup> Finally, the Court observed that the right of public servants to join trade unions is now recognised by *all* Contracting States. The only restrictions concern the police, fire service and armed forces.<sup>95</sup> Demonstrating this consensus at the international and European level left the Court no room to conclude otherwise: municipal civil servants cannot be excluded from the scope of Article 11. Accordingly, the applicants could legitimately rely on Article 11.

After concluding that Article 11 included trade-union rights for civil servants, the rest was quite straightforward for the Court. There was clear inactivity, at the national

<sup>89</sup> *Ibid.* para. 84.

<sup>90</sup> *Ibid.* para. 100.

<sup>91</sup> *Ibid.* para. 101.

<sup>92</sup> *Ibid.* para. 102.

<sup>93</sup> *Ibid.* para. 103.

<sup>94</sup> *Ibid.* paras. 104–105.

<sup>95</sup> *Ibid.* para. 106.

level, to put into effect the international agreements concerning civil servants' trade-union rights. The Court found that neither 'pressing social need' nor the reasons for the restriction were 'relevant and sufficient'.<sup>96</sup> Accordingly, the seventeen Court judges found unanimously that there had been a violation of Article 11 with regard to the failure to recognise the right of the applicants, as municipal civil servants, to form a trade union.

Next, the question about the right to collective bargaining had to be solved. The right to bargain collectively is not covered by Article 11(1) and is a pure social right. The trade union in question had persuaded the authority to engage in collective bargaining and to enter into collective agreements. The Court admitted that the right to bargain collectively and to enter into collective agreements had not previously constituted an inherent element of Article 11. However, it argued that it had to take into account the evolution of praxis in such matters both at an international and domestic level. The Court refers to the ILO Convention where the right to collective bargaining is strongly protected.<sup>97</sup>

In addition, many references were made to the European Social Charter and the European Union's Charter of Fundamental Rights. It also recognised that there was an undeniable consensus within the European states in favour of securing the right to bargain collectively.<sup>98</sup> In the light of these developments, the Court openly departed from its previous case-law and accepted that the right to bargain collectively had become one of the essential elements of Article 11.

After finding that collective bargaining was one of the essential elements of trade-union rights under Article 11, there was no longer very much for the Court to balance. The explanation that civil servants, without distinction, enjoyed a privileged position in relation to other workers was not, according to the Court's unanimous opinion, sufficient reason to interfere with their rights under Article 11.<sup>99</sup> Consequently, there had been a violation of Article 11 with regard to collective bargaining.

The Court justified its dynamic interpretation openly:

While it is in the interests of legal certainty, foreseeability and equality before the law that the Court should not depart, without good reason, from precedents established in previous cases, a failure by the Court to maintain a dynamic and evolutionary approach would risk rendering it a bar to reform or improvement [...].<sup>100</sup>

In the Grand Chamber case of *Sindicatul "Păstorul cel Bun" v. Romania*, trade union rights in the Orthodox Church were in question.<sup>101</sup> The priests and clerical staff of

<sup>96</sup> *Ibid.* paras. 116, 119–126.

<sup>97</sup> *Ibid.* paras. 147–148.

<sup>98</sup> *Ibid.* paras. 149–151.

<sup>99</sup> *Ibid.* paras. 165–169.

<sup>100</sup> *Ibid.* para. 153.

<sup>101</sup> *Sindicatul "Păstorul cel Bun" v. Romania*, 2330/09, 9 July 2013, GC.

the Romanian Orthodox Church wanted to form a trade union and the state refused, justifying this decision by citing the importance of maintaining the autonomy of the Church. The Court had first to determine whether Article 11 was applicable in the present case. In doing so, the Court relied on the strong support for the right of all workers to form trade unions, as guaranteed in the ILO Conventions and European Union law.<sup>102</sup> Consequently, the Court considered that, notwithstanding their special circumstances, members of the clergy fulfilled their mission in the context of an employment relationship falling within the scope of Article 11. Consequently, Article 11 was applicable in the present case.<sup>103</sup>

Next, the Court examined whether the interference of Article 11 was ‘prescribed by law’, pursued ‘a legitimate aim’ and was ‘necessary in a democratic society’. The lawfulness requirement and the legitimacy of the aim were rather briefly confirmed and the decisive question identified as the necessity of the interference. The proportionality examination differed from the Chamber’s judgment. The Chamber found that the national court had not taken sufficiently relevant arguments into account when refusing to register the trade union. Consequently, the Chamber found that there had been a violation of right to form a trade union. In contrast, the Grand Chamber’s majority, composed of eleven judges, considered that the principle of the autonomy of religious communities was a relevant reason to restrict the right to form a trade union for clerical staff. Accordingly, there was no violation of Article 11.<sup>104</sup>

The Grand Chamber’s emphasis on the principle of autonomy of religious communities over the trade union rights was mainly based on the argument about the lack of a European consensus on this matter.<sup>105</sup> The minority, composed of six judges, was not, however, convinced that the national court’s arguments were sufficient to justify identifying interference with rights under Article 11. The minority came to a different conclusion on the European consensus arguing that, although constitutional models vary greatly in this matter, none of the European states excluded members of the clergy from the right to form trade unions.<sup>106</sup>

The Grand Chamber took national and religious sensitivities carefully into account in this case. Religious autonomy of the Romanian Orthodox Church was considered to be of greater importance than the autonomy of churches in other European states and trade union rights had to take a few steps backwards. The previous interpretations of trade union rights, as highlighted in *Demir and Baykara*, would have led one to expect that a violation of Article 11 would have been found to have taken place also in this case.<sup>107</sup>

<sup>102</sup> *Ibid.* para. 142.

<sup>103</sup> *Ibid.* para. 148.

<sup>104</sup> *Ibid.* paras. 167–169.

<sup>105</sup> *Ibid.* para. 171.

<sup>106</sup> Joint partly dissenting opinion of judges Spielmann, Villiger, López Guerra, Bianku, Møse and Jäderblom, para. 10.

<sup>107</sup> *Demir and Baykara* (note 38).

### 3.5. CATEGORY 5: FREEDOM OF MOVEMENT (ARTICLE 2 OF PROTOCOL NO. 4)

In *Tatishvili v. Russia*, interference with Article 2 of Protocol No. 4 led, at the same time, to an interference with a number of social rights.<sup>108</sup> The applicant was a citizen of the former USSR (Union of Soviet Socialist Republics). She continued to hold Soviet citizenship and in 2000 she became a stateless person. The applicant lived in Moscow, and her application for residence registration had been declined because she was not a Russian citizen. The applicant complained about the domestic authorities' arbitrary refusal to certify her residence at the chosen address, which had substantially complicated her daily life and rendered uncertain her access to medical care. The Court decided to examine the complaint under Article 2 of Protocol No. 4.

The Court referred to the applicant's submission that residence registration is the proof of residence in the Russian Federation, so that its absence had prevented her from exercising many social rights, *inter alia*, access to medical assistance, social security, pension and the right to possess property.<sup>109</sup> The Court found that the authorities' refusal to certify the applicant's residence exposed her to administrative penalties and fines. The Court said nothing about the consequences for the applicant's social rights. However, it is clear that there had been an interference with the right to liberty of movement.<sup>110</sup>

Next, the Court examined whether the interference was justified. The first requirement was that the interference must be 'in accordance with the law'. The Government's justification for the interference was based solely on the argument of the unlawfulness of the applicant's residence in Russia. This argument was, however, strictly rejected by the Court.<sup>111</sup> The Court stressed that the application was refused because of a failure to submit a complete set of documents. It was never specified which of the required documents were missing.

Furthermore, the Court observed that grounds for refusing the registration had not been laid out. Lastly, the ECtHR paid special attention to the case law of the Constitutional Court of the Russian Federation. The Constitutional Court has held that the registration authority had a duty to certify residence, and there was no discretion for reviewing the authenticity. The ECtHR observed that the binding interpretation of the Constitutional Court was disregarded by the domestic authorities in the present case. Accordingly, the interference was not 'in accordance with the law' and this conclusion made it unnecessary to determine whether it pursued 'a legitimate aim' and was 'necessary in a democratic society'.<sup>112</sup>

<sup>108</sup> *Tatishvili v. Russia*, 1509/02, 22 February 2007.

<sup>109</sup> *Ibid.* para. 44.

<sup>110</sup> *Ibid.* para. 46.

<sup>111</sup> *Ibid.* paras. 39–41, 49.

<sup>112</sup> *Ibid.* paras. 52–54.

The Court's remaining task, to unanimously conclude that there was a violation of Article 2 of Protocol No. 4, was then quite straightforward. The outcome was in favour of social rights which were also interfered with by violating the right to movement. Regrettably, however, the Court's reasoning was silent on social rights. The Court merely referred to the applicant's submission on the consequences of the interference with many social rights. The Court could have done more in its reasoning: with the help of positive obligations, the Court could have easily included social rights under the provision of the liberty of movement. Unfortunately, the reasoning of the Court remained on a rather traditional level and left the arguments concerning social rights aside.

In *Miażdżyk v. Poland*, a restriction on the liberty of movement affected the applicant's social rights.<sup>113</sup> The applicant complained that the prohibition on leaving Poland for more than five years constituted a disproportionate restriction on his liberty of movement (Article 2 of Protocol No. 4). The applicant was waiting for criminal proceedings and a restriction of movement had been imposed on him. The applicant was a French national and his life prior to his arrest in Poland had been based in France. His family, including three children, were located in France. He also had a right to medical care in France. The applicant had made nine requests for the restriction imposed on him to be lifted. He cited, *inter alia*, his health problems. All the requests were, however, refused.

The Court's balancing in this case was quite straightforward: the disproportionality of the limitation on movement was obvious. The Court concluded unanimously that 'in view of the above' the restriction on the applicant's freedom of movement for a period of five years and two months was disproportionate, particularly given that he was forced to stay for all that period in a foreign country and was not allowed to leave even for a short period of time. Consequently, there had been a violation of Article 2 of Protocol No. 4.<sup>114</sup>

The right to medical care was one aspect of the rights that were interfered with due to the restriction of movement.<sup>115</sup> By no means, however, was the right to medical care alone decisive: the effects of the restriction of movement were disproportionate as a whole and the social right to medical care was just one element among these.

#### 4. CONCLUSIONS

The analysis of case law shows that the Court has evolved a rich case law praxis in the field of social rights. Although the Convention's text does not cover social rights, this has not stopped the Court from including social rights within the Convention's provisions. The Court has openly broadened the traditional scope of Convention provisions and incorporated social rights within the civil and political rights. This should, however, be done in an overt and transparent way. If the Court fails to acknowledge the true

<sup>113</sup> *Miażdżyk v. Poland*, 23592/07, 24 January 2012.

<sup>114</sup> *Ibid.* paras. 41–42.

<sup>115</sup> *Ibid.* para. 39.

arguments which led it to support social rights in its decisions, then there is much to criticise in relation to considerations of legal certainty and justifiability.

The Court of Justice of the European Union (hereinafter, the CJEU) has likewise extended interpretations in relation to social rights in its case law. Social rights belong primarily in the field of social policy, which does not belong to the Union's exclusive competences as questions of social policy have been left to the shared competences of the Member States and the Union (Article 4(2)(b) TFEU<sup>116</sup>). Economic policies are coordinated by the Member States (Article 5(1) TFEU). Furthermore, the protection and improvement of human health belongs to the Member States' competences (Article 6(a) TFEU). The Charter of Fundamental Rights covers both civil and political and social rights. The implementation of the Charter provisions are, however, bound to the implementation of Union law (Article 51(1) Charter). It follows that the applicability of social rights which are provided by the Charter can only arise if it is linked to the implementation of Union law (e.g. to a certain Directive or Regulation).<sup>117</sup>

*Servet Kamberaj v. Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES) and Others* before the CJEU concerned the right to housing benefit.<sup>118</sup> In this case, the national allocation of funds prevented the granting of social benefit to a non-national. The Grand Chamber, composed of thirteen judges, had to decide whether such a mechanism was in conformity with the principle of equal treatment. The CJEU took social rights provided in the Charter seriously:

[W]hen determining the social security, social assistance and social protection measures [...] the Member States must comply with the rights and observe the principles provided for under the Charter, [...]. Under Article 34(3) of the Charter, in order to combat social exclusion and poverty, the Union (and thus the Member States when they are implementing European Union law) 'recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources [...]'.<sup>119</sup>

The CJEU further emphasised the Charter's provision on social and housing assistance in the interpretation of the Directive in question and concluded that the benefit in question must be considered as being part of core benefits within the meaning of Article 11(4) of Directive 2003/109.<sup>120</sup>

The CJEU concluded that Directive 2003/109 must be interpreted as precluding, with regard to the granting of housing benefit, different treatment for third-country nationals

<sup>116</sup> OJ C 326, 26.10.2012: 47–390.

<sup>117</sup> For the social dimension of the European Union, see Rosas and Armati (2010: 187–192).

<sup>118</sup> C-571/10, *Servet Kamberaj v. Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES) and Others*, 24 April 2012, GC. The route which takes social rights into consideration in the Union law comes mainly through the fundamental freedoms (the free movement of people, goods, services and capital).

<sup>119</sup> *Ibid.* para. 80.

<sup>120</sup> *Ibid.* para. 92. Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ L 16, 23.1.2004: 44).

enjoying the status of long-term resident.<sup>121</sup> The line taken by the interpretation of the CJEU and the ECtHR was interestingly similar in that both emphasise the prohibition of any difference in treatment on grounds of nationality in access to social benefits.<sup>122</sup>

Case law, both from the CJEU and the ECtHR, illustrates a consistent trend in relation to social rights: social rights are increasingly included within the interpretation of applicable law.<sup>123</sup> This leads us to the question presented at the beginning of this article, namely whether it is legitimate for the ECtHR to read social rights into interpretations of the Convention. The answer is two-fold. Firstly, in order for the incorporation of social rights to be legitimate, the reasoning must be overt and transparent and the arguments, both for and against, must be stated. Secondly, justification of the extended interpretations should be based on widely adopted international instruments. Furthermore, additional weight should be placed on the matter of whether the majority of the Contracting States have approved that line of interpretation. Similarities in case law praxis concerning social rights' protection across the European Union is one way in which the legitimacy of the incorporation of social rights into the Convention by the European Court of Human Rights is increased. When both of the European courts are on the same side, it is hard to argue to the contrary.

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<sup>121</sup> *Servet Kamberaj* (note 118), para. 93.

<sup>122</sup> See e.g. ECtHR's case *Luczak* (note 69).

<sup>123</sup> See other recent cases of the CJEU concerning social rights, e.g. C-579/12 RX-II, *European Commission v. Guido Strack*, 19 September 2013; C-588/12, *Lyreco Belgium NV v. Sophie Rogiers*, 27 February 2014.



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## BOOK REVIEWS

Colin Lindsay and Donald Houston (eds.), *Disability Benefits, Welfare Reform and Employment Policy*, London: Palgrave Macmillan, 2013, xv + 244 pp., ISBN 978-0-230-34994-0 (hardcover)

*Disability Benefits, Welfare Reform and Employment Policy* is one of the titles in the important Palgrave Macmillan series and project, *Work and Welfare in Europe*, in which a group of significant professors, researchers, sociologists, economists from European universities and institutes try to provide, through detailed analysis and academic debate, future perspectives and useful answers to questions concerned with the problems of work and welfare in modern European societies. In thirteen chapters, this book examines one of the key problems of contemporary European society, that of the very high number of disability benefits claimants, placing special emphasis on the United Kingdom, where the numbers of claimants have been rapidly increasing in recent years.

One of the editors of this interesting book is Colin Lindsay, a senior lecturer in human resource management at the University of Strathclyde, UK who has had a significant research career in the area of labour market policies and welfare reform, whose special research interests are on the relationship between health and employability and recent policies to combat labour market inequalities. The second editor is Donald Houston, a lecturer in urban studies at the University of St Andrews, UK, who has written many academic journal articles and reports spanning fifteen years on subjects including benefits, unemployment and poor health. These two editors, together with a group of twenty further authors from various academic disciplines, who specialise in the area of employment and disability benefits, have prepared a truly useful book for anyone interested in the reform of disability benefits.

The aim of the book is to promote measures which will be useful for policy makers in reducing the number of disability benefit claimants. The problem of the high number of people claiming disability benefits in the UK has become more and more serious over the decades. According to the authors, 'at the start of 2012, more than two and a half million people of working age were out of work and claiming disability benefits'. In the introductory chapter, 'Fit for work? Representations and Explanations of the Disability Benefits "Crisis" in the UK and Beyond', Lindsay and Houston lay out the major aims of the book and the research methods which are used, explaining that the book 'explores whether these policy responses are fit for purpose by presenting

evidence on why benefit rolls have risen and why some people are more likely than others to become long-term claimants of disability benefits; critically assessing the content and outcomes of recent policy in the UK, and comparing experiences in the UK with those of other welfare states'. One of the central issues of the book, present from the first to the last page, is the idea of trying to explain the disability benefits crisis as resulting from a combination of three key factors – labour market change, employability and health problems. Each of these factors is analysed in detail in a specific chapter of the book – Chapter 4: 'Are Incapacity Benefit Claimants Beyond Employment? Exploring Issues of Employability' (Green and Shuttleworth); Chapter 5: 'Redefining "Fit for Work": Welfare Reform and the Introduction of Employment Support Allowance' (Barnes and Sissons) and Chapter 6: 'A Health Problem? Health and Employability in the UK Labour Market' (Warren, Garthwaite and Bamba) – and recommendations are presented for possible policy countermeasures and further possible action.

Two of the book's noteworthy strengths are its interdisciplinary approach and the presentation of cross-national research. Experts from a variety of disciplines including economic geography, social policy, sociology, occupational medicine, public health studies and law present detailed surveys, providing readers with a unique and clear approach which will be very useful to anyone interested in disability benefits and related issues. Further, excellent comparative methods are evident in the cross-national research by authors who present comparisons of the UK with Germany, Sweden, The Netherlands and New Zealand – Chapter 9: 'Germany: Attempting to Activate the Long-Term Unemployed with Reduced Working Capacity' (Brussig and Knuth); Chapter 10: 'Incapacity Benefits – Change and Continuity in the Swedish Welfare State' (Ulmestig); Chapter 11: 'From Dutch Disease to Dutch Fitness? Two Decades of Disability Crisis in the Netherlands' (Berkel) and Chapter 12: 'New Zealand's Reform of Sickness Benefit and Invalid's Benefit' (Lunt and Horsfall). In each case, recommendations are presented for possible policy countermeasures and further possible action. These chapters give readers the opportunity to learn something new about the way other countries implement disability benefits reforms using a variety of measures. The measures applied in the included countries will be helpful for experts from countries which have yet to adopt reforms, in choosing the best corresponding model for reducing the number of claimants who receive disability benefits.

I leave the readers to enjoy the remaining absorbing chapters not described in this review, which also deal with disability benefits reforms in interesting ways. This book includes a number of case studies, statistical data and analyses of disability benefits claimants, as well as a number of figures and tables, which assist readers in understanding and comprehending this problem.

In summary, the book is an excellent choice for all who are interested in this hot topic, especially those engaged in research in the area of welfare reform and disability benefits, and for policy makers. It is very precise in style, and comprehensible even for those who are not specialists in this subject matter, for whom reading this book

will provide a vivid picture of potential future welfare reforms to disability benefits systems.

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**Maria Korda, *The Role of International Social Security Standards: An in-depth study through the case of Greece*, 2013, Cambridge: Intersentia, 763 pp., ISBN 978-1-78068-165-8 (hardcover)**

Maria Korda's book is published as volume 32 in the very well established *Social Europe Series*. It reflects the recently renewed interest in international social security standards, formulated within the International Labour Organisation (ILO) and the Council of Europe. It might be anticipated that it would be quite a challenge to promote new (advanced) standards during a time of economic crises, when it is evident that there is a widespread trend towards reductions in social security benefits and an emphasis on individual (private) responsibility for income.

A challenge for researchers has been to explore the reasons for adopting, or not adopting, international social security standards and assembling evidence for success (or otherwise) in their implementation. There have been several academic publications on these topics, mainly from Frans Pennings' research group at the University of Tilburg, but also from social security scholars in other universities.<sup>1</sup>

This book comes from the Tilburg research group and comprises Maria Korda's doctoral thesis. This explains the rather detailed introduction which includes a number of interesting historical insights and a developmental review of standards (revealing why, in the EU, any general harmonisation of social security was considered unnecessary),<sup>2</sup> as well as a very systematic and precisely defined research problem. The main research question concerns the identification of obstacles to the further

<sup>1</sup> For instance, Pennings (2006, 2007); Dijkhoff, (2011), Tineke (2011); Becker, Ulrich, Pennings and Dijkhoff, (2013).

<sup>2</sup> The right to social security was only implicitly recognised with the inclusion of the social policy chapter in the primary EU law, mentioning the respect of fundamental social rights enshrined in the (initial) European Social Charter. In this context the Charter of fundamental rights of the EU (with its advantages and drawbacks) might also be mentioned.

promotion of the international social security standards in a developed social security system.

To provide a frame of reference, distinctive societal values and political obstacles are identified. Among the most important ones are the petrification of international social security standards after a certain period of time, and failing to take into account developments in national social security systems (e.g. reliance on the male breadwinner model, which has been superseded in many countries by a two-worker or a one full one part-time worker model). Other obstacles are identified as well, including political pressures, a preference for soft law mechanisms, a lack of financial resources, a lack of administrative and statistical capacity, and even a lack of knowledge of the standards. National legislation may not be in conformity with international social security standards, and this can constitute an important obstacle to ratification.

In the book, these obstacles are tackled not only from a legal, but also a social policy perspective. Such an interdisciplinary approach enhances the book's interest, as it is informative to learn about the rationales behind the legal rules (the author used policy documents as well as conducting her own interviews).

It may come as a surprise that only one country (Greece) is selected as a case study. However, this choice is critically evaluated in the book itself and convincing arguments are provided for this decision (among them, the choice of a fully-fledged social security system,<sup>3</sup> a system that is under constant change, the impact of strict austerity measures, and the author's language proficiency,<sup>4</sup> which made an analysis of primary sources, including legal, academic, political and other texts, possible). In this reviewer's opinion, the book succeeds in overcoming the limitations of a single country study. Extensive use is made of the comparative method of research, emphasis being placed on a vertical comparison of the Greek social security system with international social security standards. Horizontal comparison at a higher (international) level is conducted as well, cross-references being made to ILO Convention 102, concerning minimum standards of social security, and Convention 128, concerning invalidity, old-age and survivors benefits).

The entire second chapter of the book is devoted to the ILO Convention 128, which makes it an excellent commentary on this third generation instrument (of advanced minimum standards). This includes an analysis of *actes préparatoires* and the decisions of the supervisory bodies. Convention 128 has not been ratified by Greece, but it is appropriate to include it in line with the book's focus on obstacles to the adoption of standards and their implementation.

The reader learns about the Greek social security system, which is divided into social insurance, national health and (categorical) social assistance (sub-) systems,

<sup>3</sup> It should additionally be stressed that some (newly established) countries mentioned in the book have not been bound by international social security standards only since the beginning of 1990s. This may be because the former state has ratified them much earlier (e.g. ILO Convention 102 was ratified by Yugoslavia already in 1955).

<sup>4</sup> Of course, language proficiency (or barriers) should not be a decisive factor in scientific research.

in the core chapters of the book, i.e. in chapters three and four. The author explains why no general socially guaranteed minimum income exists in Greece. In these chapters, the reasons for (not) ratifying international social security standards and the relationship between national and international law are explored. In addition, a thorough analysis, comparing Greek social security legislation with these standards, is presented.

In chapter five the findings of the research analysis are presented and all of the research questions answered, based on a comprehensive assessment. The book concludes, in chapter six, with a discussion and recommendations. The author finds that there are obstacles, both of an ideological and a practical nature, which have resulted in a blockage of international social security standards.

The author is skilled in expressing her own ideas, especially in relation to the reconciliation of social commitments and economic freedoms, as well as how national and international barriers to the adoption and maintenance of respect for social security standards might be overcome.

As a result of it being a doctoral thesis, the book has a somewhat rigid structure and could be shorter in some parts. However, the extensive summary is welcome, as it provides the first 'taste' of the book's content. It also includes an extensive bibliography, appendices (with a list of people consulted and translations of the four most representative decisions of the Hellenic Council of State) and annexes (with ratification status of international social security standards and the text of ILO Convention 128).

This book may be of interest, not only to a Greek audience, but also to non-Greek speakers, since the Greek social security system has been under serious strain. As a reader, one is eager to learn more, especially about developments in the Greek social security system after 2010 (which was the period of data collection for the author's doctoral thesis). The author manages to mention and critically evaluate the latest ILO regulation, Regulation 202, concerning national floors of social protection, and expresses a wish for more flexibility and recourse to soft-law mechanisms.

In conclusion, the book significantly enriches the discussion of international social security standards and is highly recommended, not only for researchers, but also for practitioners and other stakeholders dealing with social security standards at both national and international levels.

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Ann Numhauser-Henning and Mia Ronnmar (eds.) *Normative Patterns and Legal Developments in the Social Dimension of the EU*, Oxford: Hart Publishing, 2013, 269 pp., ISBN 978-1-84946-435-2 (hardcover)

This book analyses recent normative and legal developments within the social dimension of the EU (with a focus on labour, social security and family law), in the context of current societal and demographic challenges, the impact of the economic and financial crisis, and the expression of a social market economy, already existing pre-, but strengthened post-Lisbon Treaty, which aims to balance economic and social concerns. For those who are familiar with the relevant theory, the title already gives away the overall theoretical framework: the analysis is underpinned by Anna Christensen's theory of law as 'normative patterns in a normative field' now featured in the Norma Research Programme, which also informs this publication. On this basis, the book explores legal developments and how they translate into normative patterns; the discussions are legal in nature and provided by legal researchers. The chapters are organised around three main patterns as developed by Christensen: the market-functional pattern; the protection of established position pattern; and the just distribution pattern. These normative patterns are not hierarchically organised and, as Kaarlo Tuori explains in chapter 3, any tension between them is settled at the political level.

Given the focus and intention of the book, an introduction to the general underpinning theory of law as normative patterns in a normative field very appropriately sets the scene for what is to follow. Both directly, and by contrasting it with other theories of law, the theory's propositions and ramifications are made clear to the reader in the opening chapters by Ann Numhauser-Henning and Kaarlo Tuori. As initially explained by the editors, the subsequent contributions are not simply an elaboration of that wider theory of law, but an engaging practical application of it.

Through this approach, the book very interestingly combines an analysis of social and legal developments with their placement within Christensen's theory, thus revealing how they can become more visible or readable when presented in the context of the theory and, in turn, how patterns come about in a normative field. However, the degree of fit between the analysis and the placement within Christensen's theory, and the extent to which it is sought, is not entirely consistent throughout, as a result of the differing authorships.

On the basis of the approach described above, the authors' work within various fields such as labour law, social protection of the elderly, family law and children's rights, social security and pension systems and family-work life reconciliation is presented and the resulting picture reveals certain patterns, changes in patterns, problematic or less visible balances between patterns and the need to rethink old or assumed balances.

In relation to the protection of established position pattern, Niklas Bruun discusses the impact of EU mandated austerity measures on the social policies of those Member States which received bailouts. In this context, Portugal not only stood out for its degree of compliance but also saw unique interventions by its Constitutional Court against those measures which, it was claimed, violated fundamental principles such as equality and proportionality. These characteristics could have justified a deeper analysis of the Portuguese case (even if, at the time of writing, the execution of the bailout package was still ongoing), particularly when elucidating the social impact of economic and fiscal consolidation measures. On children's rights, Titti Mattsson very illuminatingly describes the contradiction between the growing national and international recognition of children as subjects and holders of rights and the failure to account for their best interests or to include their voices in decisions that concern them, arguably due to the lack of adequate procedural tools. In this connection, it would be interesting to explore further how new family forms (a change which Mattsson also describes) might also translate into new needs or adjusted needs that should be reflected in the notion of best interests. Moreover, although fully agreeing with Mattsson's call for an adequate materialisation of children's participatory rights, I believe that the discussion would benefit from an approach that also addresses how that call might be reconciled with protective concerns that remain valid.

The risk of neglecting still prevalent gendered social practices may also work to prevent such opportunities from taking effect in practice. Also, more generally, one could question the equal conceptual positioning of work-family balance and work life commitment as opposing poles. The first of these concepts, work-family balance, already contains elements of the second and, what is more, already contains the balancing exercise which the author places outside and against an opposing pole. The debate is then between two poles, where work concerns are found in both but family concerns only in one. Might a better approach be to place the debate wholly within the work-family balance pole instead?

In my view, Deakin's analysis stands out as particularly eye-opening for its call for a 'new theoretical synthesis in both economics and law' that is actually able to understand 'labour law as a mode of market governance' (p. 159) rather than as an exogenous element to be balanced against it. Votinius employs Christensen's theory as a 'heuristic' to discover other normative patterns and specifically that of Gender Difference, in order to explain and expose how EU rules on the parenthood-work relation are structured. Finally, Fudge's analysis of labour market segmentation and precarious work within the Just Distribution pattern provides further evidence of the difficulties brought about by confining legal analyses of discrimination to questions of comparability as hitherto framed in the EU. Fudge emphasises how the regulatory comparative approach of the atypical work directives reinforces a hierarchy of employment protection.

This book is a highly important contribution where it succeeds in achieving exactly that which it proposes. It both clarifies understanding of current legal developments as placed within their particular contexts, and provides a vivid illustration of the relevance of wider theoretical frameworks to developing an understanding of law in abstract terms, as well as in relation to its concrete materialisations. Therefore, it is relevant for researchers in legal philosophical fields as well as for those engaged in the study of EU and national social law; at the same time, it will undeniably be of interest to those involved with, and working in public policy.

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